

89 - 1439

Supreme Court, U.S.  
FILED

MAR 13 1990

JOSEPH F. SAMPOL, JR.  
CLERK

CASE NO. \_\_\_\_\_

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

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CENTRAL FLORIDA CLINIC  
FOR REHABILITATION, INC., Petitioner

v.

CITRUS COUNTY HOSPITAL BOARD  
and BEVERLY ENTERPRISES, a  
California corporation d/b/a  
BEVERLY-GULF COAST, INC.,  
Respondents

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT A PUBLIC CORPORATION ORGANIZED AND EXISTING UNDER A SPECIAL LEGISLATIVE ACT WHICH DOES NOT EXPRESSLY OR IMPLIEDLY GRANT ANY POWER TO DISPLACE COMPETITION IS ENTITLED TO STATE ACTION IMMUNITY FROM ANTITRUST LIABILITY IN LIGHT OF A CLEAR LEGISLATIVE POLICY FAVORING COMPETITION.

PARTIES TO  
PROCEEDING IN LOWER COURT

Central Florida Clinic For  
Rehabilitation, Inc.

Citrus County Hospital Board

Beverly Enterprises, d/b/a  
Beverly-Gulf Coast, Inc.

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Central Florida Clinic for Rehabilitation, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

#### OPINIONS BELOW

The decision of the court of appeals is reported at 888 F.2d 1396. The opinion of the district court is not reported.

#### JURISDICTION

The decision of the Eleventh Circuit was entered on September 27, 1989. Rehearing was denied on December 14, 1989.

This court has jurisdiction pursuant to 28 U.S.C. Section 1254.

#### STATUTORY PROVISIONS INVOLVED

1. Title 15, United States Code, Section 1, provides in relevant part:

Every contract, combination in the form of trust or otherwise,

or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

2. Title 15, United States Code,

Section 2, provides in relevant part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...

## STATEMENT OF THE CASE

### I

#### STATEMENT OF THE PROCEEDINGS BELOW

Central Florida Clinic for Rehabilitation, Inc. ("CFCR") commenced this multi-count antitrust action against respondents on March 31, 1987. Beverly Enterprises ("Beverly") answered the complaint. Citrus County Hospital Board ("the Board") responded by moving for summary judgment and asserting that, even assuming the facts alleged in the complaint to be true, its conduct was pursuant to an express grant of state legislative authority and that it is therefore immune from antitrust liability. Thereafter, discovery was taken. Pleadings were amended.

In the Third Amended Complaint, [CFCR] alleges that the Board violated §§ 1 and 2 of the Sherman Act in three ways. First, the Board allegedly

attempted to monopolize and conspire (with Beverly) to monopolize patient therapy services in Citrus County, Florida, (Counts I and II). Second, [CFCR] claims that the Board used monopoly power in one market (hospital patient care) as leverage to compete unfairly in another market (out-of-hospital patient therapy services) (Counts III and IV). Third, the Board allegedly agreed with Beverly to deal reciprocally between themselves, in transferring patients and providing out of hospital patient therapy services, producing an unreasonably anticompetitive restraint of trade (Counts V and VI).<sup>1</sup>

In response, the Board again moved for summary judgment admitting anticompetitive conduct and asserting that its acts were pursuant to an express grant of legislative authority contemplating anticompetitive conduct and

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<sup>1</sup>Order granting the Board's motion for summary judgment, Appendix at 4-5.

that it is immune from liability for any resultant anticompetitive consequences.

On January 9, 1989, the district court found that:

[T]he Florida legislature evinced a state policy that contemplates the occupation of parts or all of the particular field of delivering patient care, treatment, and services throughout Citrus County to the displacement of competition. The Board's allegedly anticompetitive conduct was a foreseeable consequence of the legislature's delegation of power to the Board.<sup>2</sup>

It then granted the Board's amended motion for summary judgment as to Counts I-VI of the third amended complaint.

Thereafter, the district court found that, since the Board is immune from antitrust liability, summary judgment

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<sup>2</sup>Order granting the Board's motion for summary judgment, Appendix at 24.

should be granted in favor of Beverly.<sup>3</sup> Having disposed of the federal question, the court then dismissed the pendent state claims against the Board.

It was from the finding that the Florida legislature articulated a policy which clothed the Board with immunity from antitrust liability and under which Beverly finds protection, that appeal was taken.

Oral argument was heard by a panel consisting of Circuit Judges Fay and Kravich and District Judge Myron Thompson. On September 27, 1989, the district court's decision was affirmed without opinion. 888 F.2d 1396 (11th

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<sup>3</sup>Oral opinion with respect to Beverly's motion for summary judgment, Appendix at 33.

Cir. 1989). CFCR's request for rehearing was denied on December 14, 1989.

## II

### STATEMENT OF THE FACTS

The Board is a public non-profit corporation which was created under Chapter 65-1371, Laws of Florida, for the purpose of acquiring, building, constructing, maintaining, expanding, repairing, altering, equipping, operating, and leasing proposed and existing county hospitals, medical nursing, and convalescent homes for Citrus County, Florida. It is governed by trustees appointed by the governor. It has taxing authority. It is authorized to issue bonds, acquire real and personal property, and adopt necessary rules and regulations for the operation of its hospitals, medical nursing homes, and convalescent homes.

The Board's enabling legislation was amended by Chapters 69-944 and 70-101, Laws of Florida. Those amendments allow increased interest rates and the operation of an ambulance service by the Board.

The Board does not have the power of eminent domain. Its enabling legislation as amended makes no reference to competitive or anticompetitive activities.

CFCR is a corporation engaged in the business of providing physical, occupational, and speech therapy in Citrus County.

Beverly is a corporation engaged in the operation of nursing homes throughout the country, including Citrus County. As a necessary adjunct to its operations, Beverly requires physical, occupational, and speech therapy for its patients.

Prior to the commencement of this action, CFCR and Beverly had a business relationship under which CFCR provided Beverly with physical, occupational, and speech therapy.

Subsequently, Beverly and the Board entered into a contract under which the Board would provide the same services that had been previously provided by CFCR to Beverly.

CFCR contends that the relationship between the Board and Beverly is violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

For the purposes of its motion for summary judgment, the Board admits that its activities violate the Sherman Act, but asserts that it is immune from antitrust liability under the state action doctrine.

REASONS FOR  
GRANTING THE PETITION

THE DECISION OF THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH  
CIRCUIT IS IN CONFLICT WITH  
DECISIONS OF THIS COURT

The per curiam affirmance of the district court's decision that the Board enjoys state action immunity from antitrust liability is an extension of, and a departure from, the criteria recognized by this Court in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978). Moreover, it sanctions an extension of state action immunity into an area in which clear legislative intent is procompetitive.

To establish state action immunity for the Board, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state

policy.'" City of Lafayette v. Louisiana Power & Light Co., supra, (plurality opinion of Brennan, J.).

Here, for the Board to have state action immunity, special enabling legislation, which in no way refers to competition, must be found to be the basis of protection from liability under the Sherman Act. CFCR suggests that such a finding is contrary to decisions of the Supreme Court and controlling precedents of this court.

Starting with the seminal case of Parker v. Brown, 317 U.S. 341 (1943), this Court stressed that the Sherman Act was not intended to "restrain state action or official action directed by a state." Id. at 351. With the lone exception of Patrick v. Burget, 108 S.Ct. 1658 (1988), the ensuing cases of this Court that have expanded and refined the

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state action doctrine have involved public utilities, common carriers, cable television franchises, regulation of alcoholic beverages, and the like. In other words, the state action doctrine has developed over time in the context of industries that are traditionally regulated quite heavily by the states. It is in this light that the Supreme Court has repeatedly held that challenged anticompetitive conduct must be engaged in pursuant to a clearly articulated and affirmatively expressed "state policy to monopoly public service." Community Communications Co. v. City of Boulder, 455 U.S. 40, 51 (1982). (Emphasis added).

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court refused to find state action in the promulgation

of minimum fee schedules by a state bar association. These schedules were not mandated by ethical standards established by the Virginia Supreme Court, the policy-making body. This Court held in pertinent part that "it is not enough that anticompetitive conduct is 'prompted' by state action...." Id. at 791.<sup>4</sup> This Court continued to expound on this concept in New Motor Vehicle Board of the State of California v. Orrin W. Fox Co., 439 U.S. 96 (1978). At issue there was a California program that mandated state approval of the location of new automobile dealerships. In

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<sup>4</sup>In Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985), the Court explained that state action immunity was not available in Goldfarb "only because the state as sovereign did not intend to do away with competition among lawyers." 471 U.S. at 64 (emphasis in original).

California      Retail      Liquor      Dealers

Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), this Court explained how this specific statutory framework to regulate the sale of cars satisfied the first prong of its test: "The 'clearly articulated and affirmatively expressed' goal of the state policy was to 'displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships.'" 445 U.S. at 105 (quoting Orrin Fox, 439 U.S. at 109).

Building on these examples of clear articulation and affirmative expression of state policy is the case of Town of Hallie v. City of Eau Claire, supra.

Significant is Town of Hallie's rejection of an "active state supervision" prerequisite to state action immunity for municipalities. This Court stressed the fundamental differences

between municipalities and private actors for purposes of measuring state action immunity:

[Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state.

471 U.S. at 47; accord id. at 45 ("A private party...may be presumed to be acting primarily on his or its own behalf"). Although this Court noted that, in the case of municipalities, a "clear articulation and affirmative expression" standard can be derived from legislative intent even in the absence of any express statement regarding anticompetitive conduct, the decision makes abundantly clear that the anticompetitive conduct must be foreseeable and supported by statutory provisions which plainly show that "the

legislature contemplated the kind of action complained of."<sup>5</sup> Id. at 41-42; 42-44.

Noteworthy is this Court's stating twice in Town of Hallie that the state statutes involved there "evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation in the area of municipal provision of sewage services." Id. at 44; see also id. at 47 ("clearly articulated state policy to replace competition in the provision of sewage services with regulation".).

Read together, these cases indicate that this Court has not retreated in the least from requiring state action immunity to depend on a clear state

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<sup>5</sup>See Note 6.

policy to displace competition with regulation or monopoly public service.

A special enabling act, such as that creating the Board, that authorizes, rather than mandates, certain conduct is insufficient to support a finding of a clearly articulated and affirmatively expressed policy to displace competition with regulation or monopoly public service. Town of Hallie, 471 U.S. at 42 n.5.

Here, there are express procompetitive legislative indications that the State of Florida favors free competition in the health care area. In determining the existence or scope of state action immunity, it is necessary to examine the cumulative effect of all statutes that have a bearing on the issue. Auton v. Dade City, 783 F.2d 1009, 1011 (11th Cir. 1986). Florida's

Health Care Facilities and Health Services Planning Act, §§381.493-.498, Fla. Stat. (1985), must therefore be taken into account. This enactment contains a clear expression of procompetitive legislative intent in the health care area, as evidenced by Section 381.493(2), Florida Statutes (1985), which affirmatively states, "It is intended that strengthening of competitive forces in the health services industry be encouraged." (emphasis added). Factoring that specific statement of legislative intent into the entire legislative scheme results in the cumulative finding of a clearly articulated and affirmatively expressed state policy in favor of competition.

An analysis of the 1987 amendments shows an even greater degree of preemptive health care regulation by the

state. For instance, under Section 381.702, Florida Statutes, a certificate of need issued by the Department of Health and Rehabilitative Services is contemplated for "... a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice." Of even more significance is the legislature's current "clearly articulated state policy" that:

[T]he [Department of Health and Rehabilitative Services] is designated as the single state agency to issue, revoke, or deny certificates of need and to issue, revoke, or deny exemptions from certificate of need review in accordance with the district plans, the statewide health plan, and present and future federal and state statutes. The department is designated as the state health planning agency for purposes of federal law. (Emphasis added).

Fla. Stat. § 381.704(1) (1987).

In affirming the judgment below, the circuit court apparently agreed with the

district court's finding that the Board's enabling legislation expresses a clearly articulated state policy conferring immunity on the Board from antitrust liability.

The Eleventh Circuit's decision in Commuter Transportation Systems v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986), would at first seem consistent with that finding. However, upon further consideration, a different conclusion will be reached. Apparently, the Commuter Transportation panel did not deem it necessary to publish its analysis of the underlying enabling legislation and accepted Judge Kovachevich's earlier finding in Astro Limousine Service, Inc. v. Hillsborough County Aviation Authority, 647 F.Supp. 193, 195 (M.D. Fla. 1985), that:

[T]he [A]uthority is engaging  
in the challenged activity

pursuant to a "clearly articulated" state policy and the intent of the legislature is that the delegated actions of the Authority will have anticompetitive effects.

Commuter Transportation, 801 F.2d at 1290.

However, before making that finding, Judge Kovachevich carefully analyzed the Authority's enabling legislation, 647 F.Supp. at 194, finding that:

[The] Hillsborough County Aviation Authority is a public governmental body created by the laws of the State of Florida, is located in Hillsborough County, Florida, and exercises the function of operating the Tampa International Airport. The Authority is given certain powers in connection with the operation of this airport as delineated in Chapter 83-424, Laws of Florida, Part II, Section 2.03, 2.07, and 2.19(g). This grant of legislative authority is broad and includes all aspects regarding the operation of the airports and that to do so, the authority must enter into exclusive and limited

agreements with various operators.

While powers similar to those granted to the Hillsborough County Aviation Authority ("the Authority") can be found in the Board's enabling legislation, many can not.

Section 2.19(g) of the Authority's enabling legislation provides:

The Legislature recognizes that to further the policies and fulfill the objectives stated in this article, it is often necessary that the airports owned or operated by the Authority enter into exclusive or limited agreements with a single operator or a limited number of operators. The Authority's publicly owned or operated airports shall grant exclusive or limited agreements to displace business competition with regulation or monopoly service whenever the Authority determines, in consideration of the factors set forth in paragraph (h), that such agreements are necessary to further the policies and to fulfill the objectives stated in this section. The Legislature contemplates that the

Authority's publicly owned or operated airports will grant exclusive or limited agreements in furtherance of the policy of this state to displace business competition by exclusive or limited agreements to fulfill these policies and objectives. (Emphasis added).<sup>6</sup>

No policy similar to that expressed in Section 2.19(g) can be inferred from the Board's enabling legislation.

In Town of Hallie v. City of Eau Claire, supra; Falls Chase Special Taxing District v. City of Tallahassee, 788 F.2d 711 (11th Cir. 1986); and Auton v. Dade City, Florida, supra, the authority granted by the state legislature to each

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<sup>6</sup>The emphasized language of Section 2.19(g) is almost identical with that used by Justice Brennan in Lafayette v. Louisiana Power & Light Co., 435 U.S. at 413, and adopted in Town of Hallie v. City of Eau Claire, 471 U.S. at 39. One would have to assume that the legislative draftsman had the opinions before him when Section 2.19(g) was prepared.

of the municipalities is consistent with allowable anticompetitive conduct, but only when the enabling legislation of each is considered together with specific statutory authority from which foreseeable monopolistic results can be clearly inferred. Hallie, 471 U.S. at 40-44; Falls Chase, 788 F.2d at 713-14; Auton, 783 F.2d at 1010-1011.

Here, in contrast, there is no general or statutory provision under which any allowable anticompetitive conduct might be inferred. In fact, general law is to the contrary, with the state reserving unto itself regulation of health care.

The district court's finding that "Section 3 [of the Board's enabling legislation] appears to authorize the Board to operate 'all hospitals' in the

county"<sup>7</sup> is too expansive and is inconsistent with general and statutory laws relating to, and limiting, hospitals.<sup>8</sup>

The Board's expansion into therapy services in competition with private enterprise is far different from water and sewer services which historically have been within the domain of municipalities.<sup>9</sup> See Falls Chase, 788 F.2d at 712; Auton, 783 F.2d at 1011.

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<sup>7</sup>Order granting the Board's motion for summary judgment, Appendix at \_\_\_\_.

<sup>8</sup>Unlike the municipalities in Falls Chase and Auton, the Board has not been granted eminent domain power.

<sup>9</sup>Of significance, the Board was, by amendment, granted specific authority to operate an ambulance system. Arguably, such a specific grant would not have been necessary if the powers granted to the Board were as broad as found by the court. More significant, the fact that the legislature determined that such a  
(Footnote Continued)

If the Board had been given the express authority, as was the Authority under Section 2.19(g), to enter into exclusive contracts that are anticompetitive in nature, the arrangement between Beverly and the Board might be immune from federal and state antitrust laws.

To confer antitrust immunity on the Board necessitates a presumption that the Board can articulate its own immunity. That could only be accomplished under such "home rule" power as the Board might have and would, of course, contravene Community Communications Co. v. City of Boulder, supra. Falls Chase, 788 F.2d at 713; Auton, 783 F.2d at 1011.

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(Footnote Continued)  
specific authorization of power was necessary is a powerful indication that no articulated policy existed before.

Here, in order to obtain an exemption, the Board must "demonstrate that [its] anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with the regulation or monopoly public service.'" Town of Hallie, 471 U.S. at 37. (Emphasis added). This, it has not done.

There has been no expression of legislative intent consistent with City of Lafayette or Town of Hallie which can provide the Board with immunity.

Unless and until such time as the state clearly articulates a policy to the contrary, the Board is subject to federal and state antitrust regulation.




CONCLUSION

Accordingly, CFCR respectfully submits that issuance of a writ of certiorari is appropriate.

CERTIFICATE OF SERVICE

I certify that copy hereof has been furnished to Russell W. LaPeer, Donald A. Farmer, Jr., and James R. Pietrzak by mail this 13<sup>th</sup> day of March, 1990.

  
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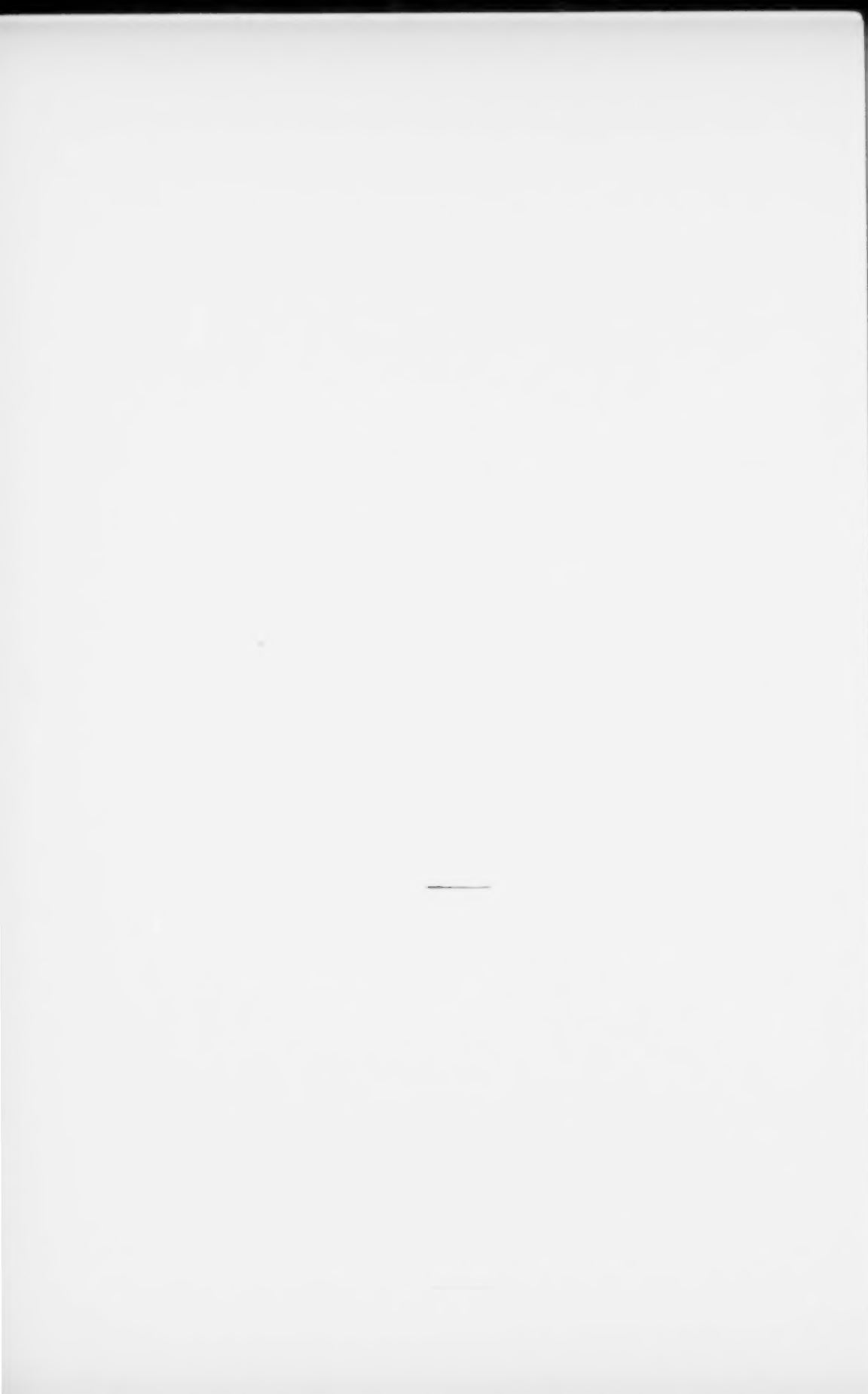


**A P P E N D I X**



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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION

CENTRAL FLORIDA CLINIC  
FOR REHABILITATION, INC.,

Plaintiff,

vs.

Case No. 87-71-Civ-Oc-12

CITRUS COUNTY HOSPITAL  
BOARD and BEVERLY ENTERPRISES,  
a California corporation d/b/a  
BEVERLY-GULF COAST, INC.,

Defendants.

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ORDER GRANTING  
MOTION FOR SUMMARY JUDGMENT

This cause is before the Court on the Amended Motion for Summary Judgment, as to Counts I through VI of the Third Amended Complaint, filed herein on August 30, 1988, by defendant Citrus County Hospital Board (hereinafter "Board"). A brief in support of said motion was filed herein on September 13, 1988. Plaintiff filed a response in opposition thereto on September 23, 1988. For the reasons

discussed below, the motion for summary judgment will be granted. The Court expresses no opinion and retains jurisdiction as to Counts VII through X of the Third Amended Complaint.

Rule 56(c), Fed. R. Civ. P., states that summary judgment shall be rendered if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Supreme Court explained the standard for summary judgment:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.

Id. at 322-323; Young v. General Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988). In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986), the Court noted that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." See Young, 840 F.2d at 828; Barnes v. Southwest Forest Industry, Inc., 814 F.2d 607, 609 (11th Cir. 1987) (equating standards for granting summary judgments and directed verdicts).

The Board's motion seeks summary judgment on the first six counts of the Third Amended Complaint, which counts allege violations of federal and state antitrust law. Plaintiff is a

corporation which is engaged in the business of providing physical, occupational and speech therapy within Citrus County, Florida. The Board is a public non-profit corporation created by the Florida Legislature to operate hospitals and medical nursing and convalescent homes in Citrus County. Defendant Beverly Enterprises, Inc., (hereinafter "Beverly") is also a corporation engaged in the business of providing physical, occupational and speech therapy within Citrus County.

In the Third Amended Complaint, plaintiff alleges that the Board violated §§ 1 and 2 of the Sherman Act in three ways. First, the Board allegedly attempted to monopolize and conspire (with Beverly) to monopolize patient therapy services in Citrus County, Florida, (Counts I and II). Second,

plaintiff claims that the Board used monopoly power in one market (hospital patient care) as leverage to compete unfairly in another market (out-of-hospital patient therapy services) (Counts III and IV). Third, the Board allegedly agreed with Beverly to deal reciprocally between themselves, in transferring patients and providing out-of-hospital patient therapy services, producing an unreasonably anticompetitive restraint of trade (Counts V and VI).<sup>1</sup>

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<sup>1</sup>The Florida Antitrust Act, Fla. Stat. § 542.01 et seq., was patterned after the Sherman Act, and was intended to complement and follow the federal court interpretations of the Sherman Act. Auton v. Dade City, Fla., 783 F.2d 1009, 1010 n.1 (11th Cir. 1986). The parties have recognized this in § 8 of the Pretrial Stipulation. Accordingly, the Court's ruling on Counts I, III, and V of the Third Amended Complaint, based on the Sherman Act, will apply as well to Counts II, IV, and VI of the Third Amended  
(Footnote Continued)

The parties have had adequate time for discovery,<sup>2</sup> and, for the purposes of the motion, there is no dispute as to the material facts. The Court is faced with the issue of whether the Board's allegedly anticompetitive actions are immune from the federal antitrust laws. Two aspects of state action immunity will be discussed in turn below: 1) whether the Board's conduct was pursuant to clearly expressed state policy which contemplated the kind of action complained of, and 2) whether plaintiff has proven an illicit conspiracy which

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(Footnote Continued)

Complaint, which assert parallel, corresponding charges under the Florida Antitrust Act, Fla. Stat. §§ 542.18 and 542.19.

<sup>2</sup>The Court entered an Order on April 6, 1988, which set August 1, 1988, as the last day for Court supervised discovery.

would exclude the Board from state action immunity.

### State Policy

The first issue which must be addressed is whether the conduct with which the Board is charged in the Third Amended Complaint, assumed for purposes of summary judgment considerations to be true and to be anticompetitive, is immune from antitrust liability because carried out pursuant to clearly expressed state policy. The state action immunity stems from the Supreme Court's decision in Parker v. Brown, 317 U.S. 341 (1943). The Supreme Court held that neither the language, nor the legislative history, of the antitrust laws evinced an intent by Congress to preempt the power of the state to make and enforce state policies with anticompetitive consequences. Id. at 351-352. The Court refused to infer

an intent to nullify a state's control over its officers and agents in activities directed by the legislature. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38 (1985) (citing Parker, 317 U.S. at 351). State action immunity exists in the instant case if the Board was created pursuant to a clearly articulated and affirmatively expressed state policy which contemplates the Board's actions. See id. at 44.

The Board was created and empowered by a special enactment of the Florida Legislature entitled the "Citrus County Hospital and Medical Nursing and Convalescent Home Act" (hereinafter "CCH Act"). 1965 Fla. Laws 1371, 1969 Fla. Laws 944, and 1970 Fla. Laws 1001. The Citrus County Hospital Board was constituted to be an agency of Citrus County and was "incorporated for the

purpose of operating hospitals and medical nursing and convalescent homes in the County." CCH Act, § 3. The Board was created to operate public hospitals and nursing and convalescent homes "primarily and chiefly for the benefit of the citizens and residents of Citrus County." CCH Act, § 5. The Board is also authorized to operate an ambulance service. § 5.

The CCH Act granted extensive powers to the Board. The Board was granted the authority "to build, erect, expand, equip, maintain, operate, alter, change, lease and repair public hospitals and medical nursing homes and convalescent homes in Citrus County." § 5. The Act defines "operate" to include "build, construct, maintain, repair, alter, expand, equip, lease, finance, and operate." § 2. The Court notes that the

word "expand" is not defined in the Act and may apply to the facilities or to the services provided. The Board has the authority to extend its services to patients from other counties and states.

§ 5. The Act grants authority for the Board to own and acquire property, to purchase any and all equipment needed and to enter into contracts to carry out the purposes of the Act. §§ 6, 8, 9, and 11.

The Board has been granted the authority to operate with a great deal of independence from the state. The Board may levy taxes, negotiate loans, borrow money, and issue bonds and revenue certificates. §§ 6, 13-15. The Act authorizes the Board to have a quasi-regulatory function in § 10 where the Board "is empowered to and shall adopt all necessary rules and regulations and by laws for the operation of said

hospitals, medical nursing homes and convalescent homes."

The Board's motion is controlled by the most recent Supreme Court precedent, Town of Hallie, supra. To establish state action immunity under the relevant legal standard, a subdivision of a state must establish only that the challenged conduct was part of a clearly articulated and affirmatively expressed state policy. The first step of the analysis is to identify a "clearly expressed state policy" that authorizes the actions of a state agency, municipality or subdivision. 471 U.S. at 38-39. If the anticompetitive activities subject to a Sherman Act claim are a foreseeable consequence of the state delegation, then the "clear articulation" standard is met and the state action doctrine bars the claim. Id. at 42-43.

The precise anticompetitive conduct of the Board that plaintiff challenges in this action is the Board's alleged attempt to be the sole provider in Citrus County of ancillary health care services; specifically, occupational and speech therapy services on an outpatient basis. The Court must examine in detail the statutory framework to determine whether the Board's allegedly anticompetitive conduct in its provision of therapy services in its service area was a foreseeable consequence of the legislature's delegation of power. As noted above, the Florida legislature's delegation of power to the Board in its statutory charter is expansive. Undoubtably, the Board has the power to provide ancillary health care services such as outpatient therapy. The critical question, however, is whether the

legislature contemplated, expressly or by implication, that the Board would occupy the entire field within its service area in a way which would exclude other competitors.

The question presented to the Supreme Court in Town of Hallie was "how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action." 471 U.S. at 40. The Court ruled that it was "not necessary...for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." Id. at 42. A statute sufficiently indicates a state policy which contemplates anticompetitive effects if it authorizes a municipality or state agency to provide a service and

to determine the areas to be served. See  
id. In Town of Hallie, a Wisconsin  
statute "specifically authorized  
Wisconsin cities to provide sewage  
services and has delegated to the cities  
the express authority to take action that  
foreseeably will result in  
anticompetitive effects." Id. at 43.  
"[I]n proving that a state policy to  
displace competition exists, the  
municipality need not 'be able to point  
to a specific, detailed legislative  
authorization' in order to assert a  
successful Parker defense to an antitrust  
suit." Id. at 39.

The Supreme Court held that the  
"clear articulation" test does not  
require that a legislature expressly  
state in a statute or its legislative  
history that it intends for the delegated  
action to have anticompetitive effects:

This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalogue all of the anticipated effects of a statute of this kind....Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal court in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of Parker and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Id. at 43-44.

Since Town of Hallie, the Eleventh Circuit has provided additional guidance concerning state action immunity in antitrust cases. In Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986), the plaintiff alleged that the Aviation

Authority was violating antitrust laws by the way in which it was restricting the operation of plaintiff's airport limousine service. The Authority was a state agency authorized to develop and administer public airports in the Tampa, Florida, area. The Authority limited limousine service due to vehicular traffic congestion at the airport; however, the plaintiff claimed that the Authority conspired with its competitors to exclude it from airport business.

The Court noted that "[u]nder the teaching of Parker, official conduct is immune from federal antitrust scrutiny if the state legislature 'contemplated the kind of action complained of.'" 801 F.2d at 1289 (quoting Parker, 317 U.S. 341). Because "[t]he Authority was authorized by the state to negotiate contracts with businesses as it may deem necessary for

the development and expansion of the airport and to grant concessions," the Court found that the Authority's actions were contemplated by the state legislature and, therefore, immunized under Parker. Id.

In the instant case, this Court notes that the Board, like the Authority, was created by the Florida Legislature and its trustees were appointed by the Governor. Id. at 1288. Also, both the Board and the Authority were authorized to exercise wide discretion in providing services within a given area. Id. Although neither the Board's actions in expanding into ancillary health care services nor the Authority's actions pertaining to limousine services were specifically authorized by the state legislature, the Court finds that, as with the Authority's actions, the Board's

actions were contemplated by the legislature.

In Falls Chase Special Taxing District v. City of Tallahassee, 788 F.2d 711 (11th Cir. 1986), and Auton v. Dade City, Fla., 783 F.2d 1009 (11th Cir. 1986), plaintiffs claimed that municipalities were violating antitrust laws by monopolizing water and sewage treatment services and by controlling the construction of water wells, respectively. In both cases, the Court held:

While a general grant of authority to govern local affairs is insufficient to constitute a clear articulation of state policy because the State's position is neutral with respect to the city's conduct, Community Communications Co. v. City of Boulder, 455 U.S. 40, 54-56, it is not necessary for the legislature to state explicitly that it intends or expects the municipality's conduct to have anticompetitive effects.

Falls Chase, 788 F.2d at 713; Auton, 783 F.2d at 1010. The state action immunity applied in both cases because the state statutes cited in the cases indicated that "the legislature recognized that municipal public works often require anticompetitive practices." Id.

Plaintiff argues that all three of these recent Eleventh Circuit cases are tied closer to express authority from the state which clearly contemplates anticompetitive conduct. Plaintiff also argues that, unlike the Board, the defendants in these three cases had special authority to regulate. As noted above, however, the Board had complete authority to regulate the operation of the hospitals, medical nursing homes and convalescent homes in Citrus County. Although the state authority which contemplated anticompetitive conduct was

clearer in the cases cited, the CCH clearly evidences a state policy which contemplated the Board's movement into the area of outpatient therapy services. The express grant of authority which defined the Board's purpose and area of operations may be fairly construed to contemplate that the Board might displace competition for outpatient services in Citrus County.

The Court notes that the statutory authority in the instant case is broad and expansive within a specified field and for a particular purpose. Section 3(a) of the CCH states that the Board is "incorporated for the purpose of operating hospitals and medical nursing and convalescent homes in the county." The Act clearly authorizes the Board to provide a service. The language of the CCH appears to give the Board wide

discretion in the area of medical, including therapeutic, care in Citrus County. Although other portions of the CCH describe the Board's duties with reference to "public hospitals", section 3 appears to authorize the Board to operate all "hospitals" in the County. The Court finds that the CCH is more than a general grant of authority and that the legislation establishing the Board is a clearly expressed state policy which contemplated the monopolization of ancillary health care services in Citrus County. Based on the CCH and the guidance in Town of Hallie and recent Eleventh Circuit cases, the Court finds that the Board's allegedly anticompetitive actions were a foreseeable consequence of the state legislation.

Plaintiff claims that two other Florida statutes indicate that the Florida legislature did not contemplate the Board's anticompetitive actions. In the "Health Facilities and Health Services Planning Act.," Fla. Stat. § 381.493(2), eight general planning guidelines for individuals in the health care field are listed. The last statement reads as follows: "It is intended that strengthening of competitive forces in the health services industry be encouraged." Because the statement is a general provision which is not mandatory, but merely permissive,<sup>3</sup> the statement does not negate or limit the Board's express authority to operate

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<sup>3</sup>The statutory guidance is similar to one of the general Wisconsin statutes which the Supreme Court discussed in Town of Hallie, 471 U.S. at 42 n.5.

and make rules and regulations concerning the hospitals and medical nursing and convalescent homes in Citrus County.

The second statute cited by plaintiff as evidence that the Florida Legislature did not contemplate anticompetitive actions by the Board is Fla. Stat. § 155.40. The statute authorizes public hospitals to reorganize into not-for-profit Florida corporations. Plaintiff claims that since such new corporations would not be entitled to state action immunity for anticompetitive actions, the statute indicates that there is no ongoing policy that would authorize the Board to engage in monopolistic conduct in ancillary areas. The Court finds that this statute is irrelevant to the issue at hand for two reasons. First, the statute only addresses reorganization of public hospitals into

not-for-profit corporations; it does not address the limits of the powers of state agencies such as the Board. Secondly, it is possible for private actors (like a private not-for-profit corporation) to be entitled to state action immunity from antitrust allegations if the requisite state supervision exists. See Town of Hallie, 471 U.S. at 46.

Upon careful review of the grant of authority to the Hospital Board, the statutes cited by plaintiff, and the allegations in the Third Amended Complaint, the Court finds that the Florida legislature evinced a state policy that contemplates the occupation of parts or all of the particular field of delivering patient care, treatment, and services throughout Citrus County to the displacement of competition. The Board's allegedly anticompetitive conduct

was a foreseeable consequence of the legislature's delegation of power to the Board.

Proof of Unauthorized Anticompetitive Conduct

The second aspect of state action immunity which must be addressed is whether plaintiff has proven that the Board's anticompetitive conduct exceeded the scope of the state action antitrust immunity. If a clearly articulated and affirmatively expressed state policy which contemplates anticompetitive conduct exists, as defined by Town of Hallie, plaintiff "must show a conspiracy not authorized by state law and thus beyond protection of state action immunity. Commuter Transportation, 801 F.2d at 1291. "In Greyhound Rent-A-Car, Inc. v. City of Pensacola, 676 F.2d 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014

(1983), the court found the plaintiff must prove an illicit conspiracy to exclude the entity from state action immunity." Id.

In Falls Chase, supra, the plaintiff argued that the defendant municipality lost its immunity by failing to strictly follow state procedural requirements. 788 F.2d at 714. The Eleventh Circuit noted that in Scott v. City of Sioux City, 736 F.2d 1207, 1215-16 (8th Cir. 1984), cert. denied, 471 U.S. 1003 (1985), the Court "decided that a city's slight departure from state mandated procedures did not abrogate the city's antitrust immunity." Falls Chase, 788 F.2d at 714. This Circuit cited with approval the following language from Scott: "The city's departure from state procedural requisites would have to be extreme to warrant the threat of

antitrust liability. State authorization for antitrust purposes does not require administrative decisions that are free from ordinary errors." Id. Based on the policies supporting immunity from liability for anticompetitive conduct, this court finds that the requirement of an extreme departure from state requirements applies as well to state agencies which depart from their express authority to act.

Plaintiff cites Bolt v. Halifax Hospital Medical Center, 851 F.2d 1273 (11th Cir. 1988), in support of its claim that the Board participated in an illicit conspiracy which would negate the Board's immunity from antitrust liability. In Bolt, the plaintiff, a physician, claimed that a private, profit-making hospital, a private, not-for-profit hospital, and a governmental district hospital

participated in a community-wide conspiracy to revoke the plaintiff's staff privileges at all three hospitals. The Court ruled that such a conspiracy was not included within the scope of any articulated policy of the State of Florida. Although the governmental hospital district had otherwise been clothed with state action immunity, it did not enjoy that immunity for this conspiracy "to rid a medical community of a particular physician." Id. at 1284.

The conspiracy in Bolt was not protected by state action immunity because it was beyond the scope of any "clearly articulated" state policy authorizing it. The removal of physicians from the staffs of other hospitals and the expulsion of physicians from the county medical society are actions which appear to be motivated more

by malice toward the individual physicians than by authorized interests of state hospitals. In contrast to the conspiracy in Bolt, there is no significantly probative evidence in the instant case that the conspiracy between the Board and Beverly, assumed to be true, was not within the scope of the Board's authority.

The Court finds that the allegations in the Third Amended Complaint fall within the scope of patient care services and activities for which the Board is authorized by the CCH. Plaintiff's charge in Count I of a conspiracy to monopolize patient therapy services in nursing homes and other out-of-hospital settings is not extraneous to the powers and purpose conferred on the Board by the Legislature. Similarly, plaintiff's allegations in Count V of a reciprocal

dealing agreement between the Board and Beverly is also within the purview of the Board's statutory authorization.

The mere fact that a "contract, combination, or conspiracy" exists between a state agency entitled to immunity and one or more private actors does not mean that the immunity is automatically lost. As noted above, this Circuit has held that an illicit conspiracy, not any conspiracy, must be proven to remove the state action immunity. Commuter Transportation, 801 F.2d at 1291. The Court finds that plaintiff has failed to make a showing sufficient to establish the existence of a conspiracy that was not authorized by state law and thus beyond protection of state action immunity. Based on all of the evidence presented in support of and in opposition to the motion for summary

judgment, the Court concludes that there is insufficient evidence favoring plaintiff for a jury to conclude that defendant participated in an illicit conspiracy or anticompetitive action which was not contemplated by the state.

Accordingly, it is

ORDERED AND ADJUDGED:

1. That defendant Citrus County Hospital Board's Amended Motion for Summary Judgment as to Counts I through VI of the Third Amended Complaint is hereby granted; and

2. That summary judgment is hereby entered in favor of defendant Citrus County Hospital Board as to Counts I through VI of the Third Amended Complaint.

DONE AND ORDERED in Chambers at  
Jacksonville, Florida, this 9th day of  
January 1989.

/s/ Howell W. Melton  
United States District  
Judge

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION

CENTRAL FLORIDA CLINIC  
FOR REHABILITATION, INC.

Plaintiff

vs.

87-71-Civ-Oc-12

CITRUS COUNTY HOSPITAL  
BOARD AND BEVERLY ENTERPRISES,  
a California Corporation, d/b/a  
BEVERLY-GULF COAST, INC.

Defendants

ORAL OPINION

THOMAS, Senior Judge

Defendant Beverly California  
Corporation, sued herein as Beverly  
Enterprises, moves for summary judgment  
on all claims against it, pursuant to  
Rule 56(b) of the Federal Rules of Civil  
Procedure.

Beverly bases its motion on the  
court's January 9, 1989 order granting  
summary judgment to defendant Citrus  
County Hospital Board.

The motion of Beverly finds a direct predicate in its amended answer filed this morning; and also in its first defense and eight defense paragraph 38 of its answer of June 5, 1987.

I hear this for good cause shown since Judge Melton's order of January 25, 1989. Judge Melton found, among other things,

that the allegations in the Third Amended complaint fall within the scope of patient care services and activities for which the Board is authorized by the [Citrus County Hospital and Medical Nursing and Convalescent Home Act]. Plaintiff's charge in Count I of a conspiracy to monopolize patient therapy services in nursing homes and other out-of-hospital settings is not extraneous to the powers and purpose conferred on the Board by the Legislature. Similarly, plaintiff's allegations in Count V of a reciprocal dealing agreement between the Board and Beverly is also within the purview of the Board's statutory authorization.

The mere fact that a "contract, combination, or conspiracy" exists between a state agency entitled to immunity and one or more private actors does not mean that the immunity is automatically lost. As noted above, this Circuit has held that an illicit conspiracy, not any conspiracy, must be proven to remove the state action immunity. Commuter Transportation, 801 F.2d at 1291.

The Court finds that plaintiff has failed to make a showing sufficient to establish the existence of a conspiracy that was not authorized by state law and thus beyond protection of state action immunity. Based on all of the evidence presented in support of and in opposition to the motion for summary judgment, the Court concludes that there is insufficient evidence favoring plaintiff for a jury to conclude that defendant participated in an illicit conspiracy or anticompetitive action which was not contemplated by the state.

Defendant Beverly asserts that the immunity found by the court to apply to Citrus County Hospital applies equally to

Beverly. Citing case law, Beverly states that "once an agreement between a state governmental body and purely private parties has been found to meet the tests for state action immunity, the private parties to the agreement are immunized as well as the government body."

In support of its motion defendant Beverly cites several cases, one of which is particularly instructive and authoritative. In Cine 42nd Street Theater Corp. v. Nederlander Organizations Inc., 790 F.2d 1032 (2d Cir. 1986) the court found that private theater operators, acting in concert with a state established urban development corporation, enjoyed state action immunity from antitrust liability. In pertinent part, Cine states

Because the UDC and its subsidiary had the authority to conduct the challenged sales and award the leases in an

anticompetitive manner, the City's participation in those sales, which is recognized and affirmatively encouraged in the UDC's enabling legislation, is also protected.

For the same reasons, the private appellees acting in concert with the UDC are also entitled to state immunity. This participation was actively encouraged by the legislature. In fact, one of the fundamental goals of the Act was to have the UDC attract private investors and developers. When the UDC accomplishes its goal in a protected manner, and the participation of private third parties was reasonably contemplated by the legislature, allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC.

Similarly, Judge Melton holds, in effect, that joint participation of purveyors of medical services and the Hospital Board, was encouraged by the legislature. I read pertinent parts of his opinion.

Since Town of Hallie, 471 U.S. 34 (1985), the Eleventh Circuit has provided additional

guidance concerning state action immunity in antitrust cases. In Commuter Transportation Systems, Inc., v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986), the plaintiff alleged that the Aviation Authority was violating antitrust laws by the way in which it was restricting the operation of plaintiff's airport limousine service. The Authority was a state agency authorized to develop and administer public airports in the Tampa, Florida, area. The Authority limited limousine service due to vehicular traffic congestion at the airport; however, the plaintiff claimed that the Authority conspired with its competitors to exclude it from airport business.

The Court noted that "[u]nder the teaching of Parker, official conduct is immune from federal antitrust scrutiny if the state legislature 'contemplated the kind of action complained of.'" 801 F.2d at 1289 (Quoting Parker, 317 U.S. 341). Because "[t]he Authority was authorized by the state to negotiate contracts with businesses as it may deem necessary for the development and expansion of the airport and to grant concessions," the court found that the

Authority's actions were contemplated by the state legislature and, therefore, immunized under Parker. Id.

In the instant case, this Court notes that the Board, like the Authority, was created by the Florida Legislature and its trustees were appointed by the Governor. Id. at 1288. Also, both the Board and the Authority were authorized to exercise wide discretion in providing services within a given area. Id. Although neither the Board's actions in expanding into ancillary health care services nor the Authority's actions pertaining to limousine services were specifically authorized by the state legislature, the Court finds that, as with the Authority's actions, the Board's actions were contemplated by the legislature.

....

The Court notes that the statutory authority in the instant case is broad and expansive within a specified field and for a particular purpose. Section 3(a) of the CCH states that the Board is "incorporated for the purpose of operating hospitals and medical nursing and convalescent homes in the county." The act clearly

authorizes the Board to provide a service. The language of the CCH appears to give the Board wide discretion in the area of medical, including therapeutic, care in Citrus County. Although other portions of the CCH describe the Board's duties with reference to "public hospitals", section 3 appears to authorize the Board to operate all "hospitals" in the County. The Court finds that the CCH is more than a general grant of authority and that the legislation establishing the Board is a clearly expressed state policy which contemplated the monopolization of ancillary health care services in Citrus County. Based on the CCH and the guidance in Town of Hallie and recent Eleventh Circuit cases, the Court finds that the Board's allegedly anticompetitive actions were a foreseeable consequence of the state legislation.

Relying on Cine 42nd Street Theaters and other cited cases, Beverly states "The court's conclusion that the Hospital's alleged activities were immunized requires dismissal of the claims made against Beverly as much as it does the claims against the Hospital."

Plaintiff Central Florida Clinic for Rehabilitation, Inc. (CFCR), in response to Beverly's immunity claim, states

Plaintiff, Central Florida Clinic for Rehabilitation, Inc. ("CFCR"), has reviewed current case law with respect to third party liability once it has been established that a public body enjoys immunity from antitrust liability due to the state action immunity doctrine. CFCR reluctantly admits that it is unable to find any case law supporting the position that here Beverly Enterprises, Inc. ("Beverly") would be liable for violations of the federal antitrust laws as a result of its dealings with the Board, an immune party.

The case law cited by both Beverly and CFCR supports the position that a finding that the Hospital is immunized under the state action doctrine, compels a finding that Beverly also enjoys immunity. One of the conspirators in the alleged anticompetitive conduct is protected from liability, and to hold the other conspirator liable would defeat the

purpose of the doctrine of state action immunity.

Accordingly, defendant Beverly's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ William K. Thomas  
United States District  
Senior Judge



89- 1489

Supreme Court, U.S.

FILED

MAR 14 1990

JOSEPH F. SAPNIO, JR.  
CLERK

CASE NO. \_\_\_\_\_

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

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CENTRAL FLORIDA CLINIC  
FOR REHABILITATION, INC., Petitioner

v.

CITRUS COUNTY HOSPITAL BOARD  
and BEVERLY ENTERPRISES, a  
California corporation d/b/a  
BEVERLY-GULF COAST, INC.,  
Respondents

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

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SUPPLEMENTAL APPENDIX

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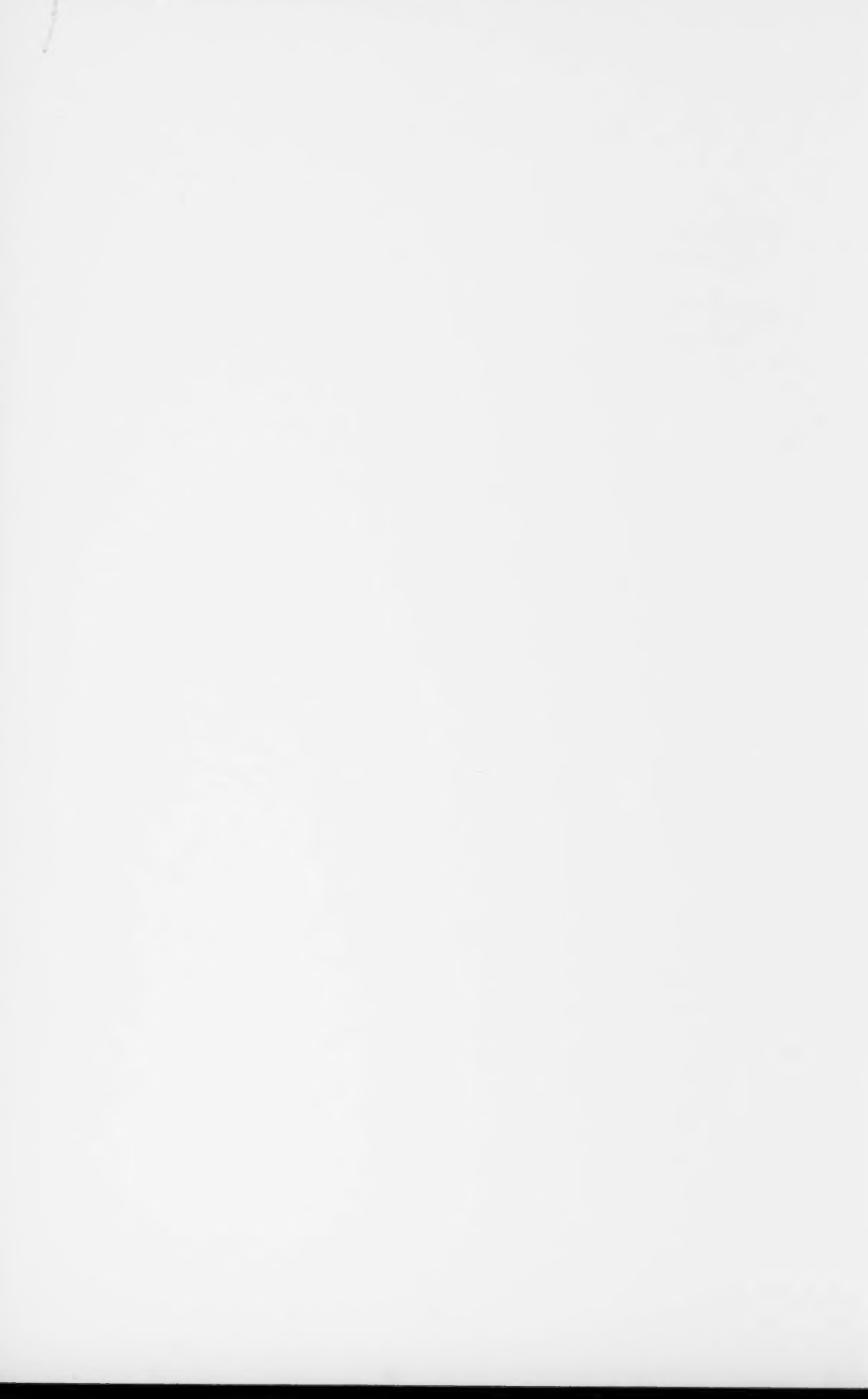
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Attorney for Petitioner



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IN THE UNITED STATES  
COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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NO. 89-3131

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D.C. Docket No. 87-71

CENTRAL FLORIDA CLINIC FOR  
REHABILITATION, INC.,

Plaintiff-Appellant,

versus

CITRUS COUNTY HOSPITAL BOARD,  
BEVERLY ENTERPRISES, a California  
corporation, d/b/a BEVERLY-GULF  
COAST, INC.,

Defendants-Appellees.

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Appeal from the United States  
District Court for the  
Middle District of Florida

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(September 27, 1989)

Before FAY and KRAVITCH, Circuit Judges,  
and THOMPSON\*, District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R.  
36-1.

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\*Honorable Myron H. Thompson, U.S.  
District Judge for the Middle District of  
Alabama, sitting by designation.

IN THE UNITED STATES  
COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

NO. 89-3131

---

CENTRAL FLORIDA CLINIC FOR  
REHABILITATION, INC.,

Plaintiff-Appellant,

versus

CITRUS COUNTY HOSPITAL BOARD,  
BEVERLY ENTERPRISES, a California  
corporation d/b/a BEVERLY-GULF  
COAST, INC.,

Defendants-Appellees.

---

Appeal from the United States  
District Court for the  
Middle District of Florida

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ON PETITION(S) FOR REHEARING  
AND SUGGESTION(S) OF  
REHEARING IN BANC

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(Opinion September 27, 1989, 11Cir.,  
198\_\_, \_\_ F.2d \_\_) .  
( )

Before FAY and KRAVITCH, Circuit Judges,  
and THOMPSON\*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch  
United States Circuit Judge

\*Honorable Myron H. Thompson, U.S.  
District Judge for the Middle District of  
Alabama, sitting by designation.



No. 89-1439

Supreme Court, U.S.  
**FILED**  
**APR 26 1990**

JOSEPH E. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

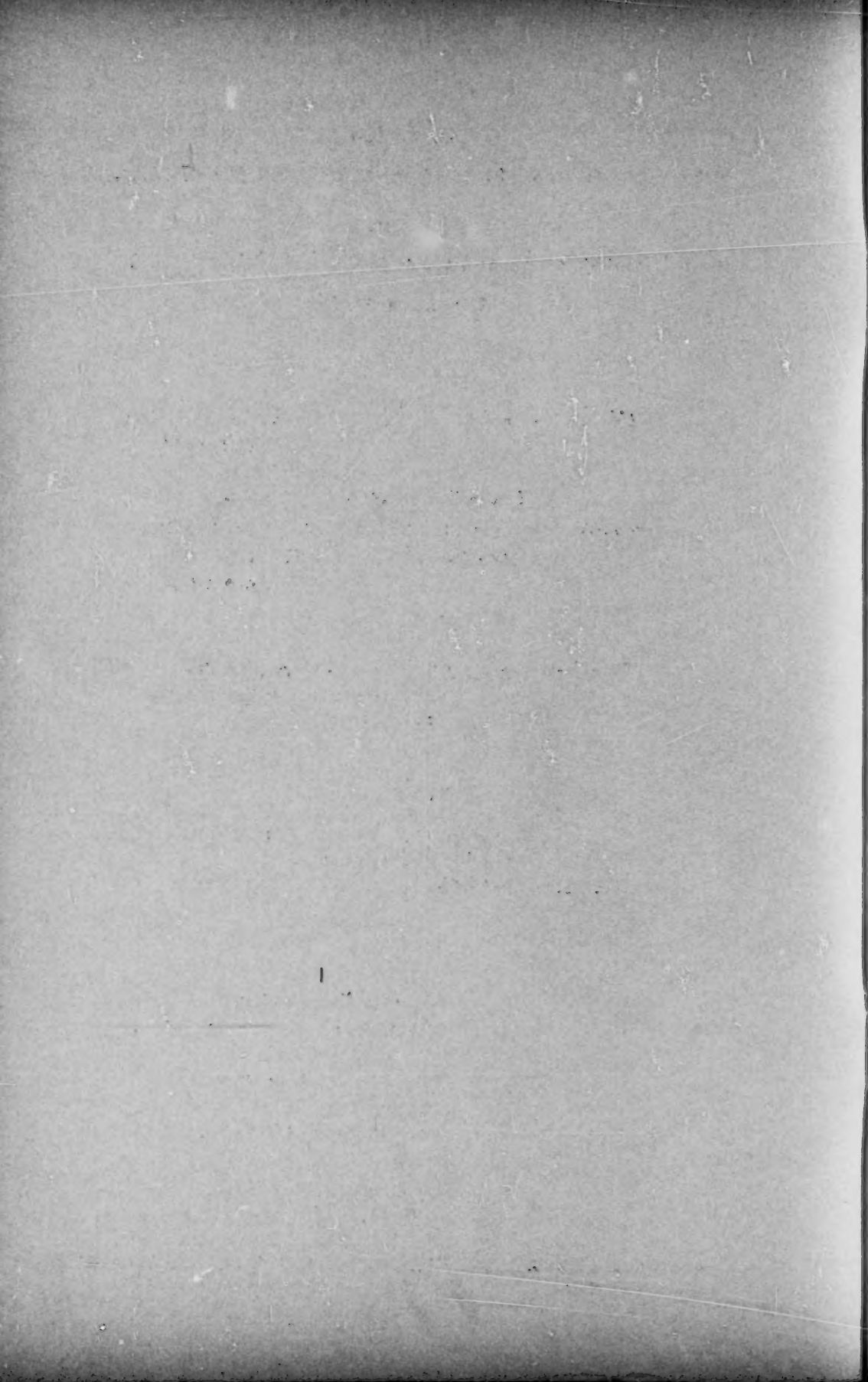
CENTRAL FLORIDA CLINIC FOR REHABILITATION, INC.,  
v. *Petitioner,*

CITRUS COUNTY HOSPITAL BOARD and  
BEVERLY ENTERPRISES, a California Corporation,  
d/b/a BEVERLY-GULF COAST, INC.,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

BRIEF IN OPPOSITION  
FOR RESPONDENT  
BEVERLY CALIFORNIA CORPORATION

DONALD A. FARMER, JR.  
POPHAM, HAIK, SCHNOBRICH &  
KAUFMAN, LTD.  
1800 M Street, N.W.  
Suite 300 South  
Washington, D.C. 20036  
(202) 828-5300  
*Counsel for Respondent*  
*Beverly California Corporation*



**QUESTION PRESENTED FOR REVIEW**

Whether the courts below correctly concluded that there was no significantly probative evidence of an anti-competitive agreement outside the scope of the antitrust immunity conferred upon the Citrus County Hospital Board by the Florida state statute that created the Board?

## **PARTIES TO THE PROCEEDINGS BELOW**

The parties below were as listed in the Petition for Writ of Certiorari, except that the correct corporate identity of "Beverly Enterprises," listed in the Petition, is Beverly California Corporation, d/b/a Beverly-Gulf Coast.

Supreme Court Rule 29.1 requires listing of the following parent and subsidiary corporations of Beverly California Corporation:

Beverly Enterprises, Inc, a Delaware corporation, owns all of the voting securities of Beverly California Corporation.

Beverly California Corporation has a partial ownership interest (indicated in parentheses) in the following corporations:

- Vantage Health Care Corporation (25%)
- Beverly Japan Corporation (49%)
- Colonial Manors of Oakland, Inc. (21.1%)
- Riverview Development Corporation (2.79%)
- Treatment Centers of America (61%)

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

---

No. 89-1439

---

CENTRAL FLORIDA CLINIC FOR REHABILITATION, INC.,  
*Petitioner,*

v.

CITRUS COUNTY HOSPITAL BOARD and  
BEVERLY ENTERPRISES, a California Corporation,  
d/b/a BEVERLY-GULF COAST, INC.,  
*Respondents.*

---

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

---

**BRIEF IN OPPOSITION  
FOR RESPONDENT  
BEVERLY CALIFORNIA CORPORATION**

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**STATEMENT OF THE CASE**

Central Florida Clinic for Rehabilitation ("CFCR") filed a complaint against the Citrus County Hospital Board ("the Board") and Beverly Enterprises ("Beverly"), alleging that an agreement between the Board and Beverly had caused the Board to replace CFR as

the provider of therapy services in a nursing home operated by Beverly in the town of Inverness, Florida. CFCR's third amended complaint alleged that the Board had breached a duty to maintain the confidentiality of information obtained in CFCR's attempt to sell its business to the Board, that the Board had tortiously interfered in CFCR's contractual relationship with Beverly and others, and that the Board had attempted to monopolize a market for nursing home therapy services in the Inverness area of Citrus County, Florida. CFCR alleged that the Board and Beverly had violated section two of the Sherman Act by conspiring to monopolize the above market, and had restrained trade in violation of section one of the Sherman Act by agreeing that Beverly would replace CFCR with the Board as the therapy provider in the Inverness nursing home, and the Board would refer patients to Beverly. (The text of sections one and two of the Sherman Act, 15 U.S.C. §§ 1 & 2, is set forth at pages vii-viii of CFCR's Petition for Writ of Certiorari ("Petition").)

Beverly answered the complaint, denying any anti-competitive agreement with the Board, and stating that it had lawfully terminated its contract with CFCR because it was not satisfied with CFCR's performance.

The Board did not answer the complaint, but moved for summary judgment on the antitrust claims on the ground that the Florida statute establishing the Board contemplated that it might enter into anticompetitive conduct, and therefore the alleged conduct was immune from the antitrust laws as state action.

After completion of discovery, and shortly before the trial, the District Court granted the Board's motion for summary judgment on the antitrust claims. Beverly then moved for summary judgment on the ground that all claims against Beverly were based on the alleged agreement with the Board that had been found immune from the antitrust laws. The court granted Beverly's

motion, disposing of all the federal claims in the case, and then dismissed the pendent state law claims.

CFCR appealed the summary judgment ruling to the Court of Appeals for the Eleventh Circuit, and after oral argument the Court of Appeals affirmed *per curiam* without opinion. CFCR moved for rehearing in banc, which was denied on December 14, 1989.

### SUMMARY OF ARGUMENT

The decision below can be sustained entirely on the District Court's conclusions as to the relevant facts. Full discovery was held and the case was ready for trial. Plaintiff did not allege that a monopoly had been attained or even that there had been a specific restraint of trade, just that plaintiff had been excluded from providing therapy services at one nursing home. The District Court concluded that there was no significantly probative evidence of anticompetitive conduct outside the scope of state legislative authorization.

The basic error claimed in the petition for certiorari is that the District Court made overbroad statements as to the types of anticompetitive conduct contemplated by the Florida legislature in the statute creating the Board. If the decision is left untouched, it would not conflict with any decision of this Court or any Circuit because the District Court's statements about state action immunity are not necessary to sustain the decision below.

Certiorari would likely be improvident because the factual allegations in this case, taken as admitted for purposes of summary judgment, are not sufficiently specific to develop the legal issues clearly. The opinion of the District Court was not reported, and was affirmed without opinion by the Eleventh Circuit. Thus, even if the unreported opinion conflicts with decisions of this Court, there are opinions by the Eleventh Circuit that are consistent with this Court's rulings which would prevail over the District Court opinion as precedent.

## ARGUMENT

### **I. THE DECISION BELOW CAN BE SUSTAINED ON THE BASIS OF THE LOWER COURTS' CONCLUSIONS ABOUT THE CONDUCT ALLEGED, WITHOUT ELABORATING ON THE LAW OF STATE ACTION IMMUNITY.**

CFCR argues that the statute that created the Board cannot confer antitrust immunity because it merely authorizes the Board to provide hospital and other health care services, without specifically indicating that certain anticompetitive actions are contemplated. CFCR's argument focuses almost exclusively on the Florida statutes that apply to hospitals, and on this Court's state action immunity decisions. The specific nature of the anticompetitive conduct alleged by CFCR remains undeveloped.

The central claim of CFCR's complaint was that the Board decided to enter the therapy business, negotiated with CFCR about buying CFCR's business, obtained confidential information about CFCR's business and customers, and then conspired with Beverly to displace CFCR as the therapy provider at the nursing home. Almost all of the specific allegations of misconduct relate to the tort claims. The antitrust claims rest on the central proposition that the Board and Beverly agreed to dislodge CFCR from its contract to provide therapy at Beverly's nursing home, and that it violated the antitrust laws for them to do so.

The District Court simply did not believe this conspiracy claim was credible enough to submit to a jury. In part, the District Court based this conclusion on its detailed interpretation of the scope of antitrust immunity created by the Florida statutes involved. It is that detailed but rather unfocused search for statutory intent that CFCR asks this Court to review. The District Court's opinion rests on solid ground even without such a review.

There is no dispute that the Board was authorized by the state legislature to provide hospital and therapy services. Petition, page 5. The District Court concluded that CFCR did not bear its burden of showing that the Board engaged in anticompetitive activity outside the normal scope of those authorized services. The District Court's opinion says that:

The parties have had adequate time for discovery, and, for the purposes of the motion, there is no dispute as to the material facts.

Appendix to Petition for Writ of Certiorari ("Appendix"), page 6 (citations omitted).

The opinion reviewed the alleged actions of the Board, insofar as possible on the pleadings, and concluded that:

[T]here is no significantly probative evidence in the instant case that the conspiracy between the Board and Beverly, assumed to be true, was not within the scope of the Board's authority.

Appendix, page 29. An overly literal reading of the opinion might suggest the District Court believed that the Board was authorized by the statute to enter into conspiracies to monopolize therapy in Citrus County. To the contrary, the court properly concluded that generalized conspiracy allegations do not defeat state action immunity and require a trial.

Beverly affirmed in its answer that it terminated its therapy contract with CFCR because it was not satisfied with CFCR's performance. The District Court could have granted summary judgment because Beverly's termination of the CFCR contract was just as likely to be an independent decision as one produced by a conspiracy. See, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

The District Court properly noted that summary judgment is required when, after full discovery, a party fails to make a showing sufficient to establish the existence

of an element essential to the party's case, on which that party would bear the burden of proof at trial. Appendix, page 2, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). A trial court should grant summary judgment in the event that the non-moving party fails to come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 587 (1986).

## **II. THE ELEVENTH CIRCUIT'S DEFINITION OF THE STATE ACTION DEFENSE DOES NOT REQUIRE REVISION BY THIS COURT.**

The basic error alleged is that the District Court opinion made overbroad statements about the types of anti-competitive actions contemplated by the statute authorizing the Board to provide hospital and other health care services. Petition, page 9. If the Court were to grant certiorari, the decision would likely be improvident because the factual record below is not well developed, and lends itself only to an abstract discussion of the law. Review also is unnecessary because other opinions by the Eleventh Circuit would prevent the per curiam decision in this case from being cited as precedent in conflict with the decisions of this Court or the Circuit Courts of Appeal.

The District Court opinion correctly stated that state action immunity exists if the allegedly anticompetitive conduct is the type of conduct contemplated by a clearly articulated and affirmatively expressed state policy. Appendix, page 8. There is nothing in the opinion to compel the conclusion that the District Court failed to follow this standard. As is shown in Section I above, the District Court's detailed discussion of statutory intent is not necessary to justify the result reached.

If the District Court opinion had said anything in conflict with the many state action decisions by this

Court and the Circuit Courts of Appeal, this Court would not need to reach out to correct it. The Eleventh Circuit decisions cited by CFCR (Petition, pages 15-23) are consistent with the "clearly articulated and affirmatively expressed" standard used by this Court. For instance, the Eleventh Circuit's decision in *Commuter Transportation Systems v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), provides a thorough and correct examination of a Florida statute to see whether certain specific anticompetitive actions were contemplated by a clearly articulated and affirmatively expressed state statutory policy.

CFCR argues that there is a conflict between the *Commuter Transportation* decision and the present case because the Board in this case had less explicit authority to eliminate competition than the Hillsborough County Aviation Authority did in the *Commuter Transportation* case. Petition, page 21. CFCR argues that the Board's enabling legislation does not necessarily contemplate anticompetitive action by the Board. *Id.* This general discourse on statutory intent is simply not necessary because the summary judgment in this case can be justified on the basis of the District Court's correct assessment that CFCR would not be able to prove anticompetitive conduct outside the normal scope of a municipally-owned business enterprise.

CFCR's argument might be persuasive if this Court had ruled, or wished to rule, that in order to make out a state action defense, the state legislation involved must specifically recite that it expects anticompetitive activity by the municipality. As the District Court correctly pointed out, this Court already has decided that it is

not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects.

Appendix, page 13, quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985). This Court may

never have the opportunity to perfectly define how “clearly articulated” a state policy must be for a municipality to invoke the state action defense. *Id.* at 40. The present case, however, does not present an opportunity to improve on the answer to that question given in the *Town of Hallie* decision and related decisions. If such an opportunity is presented, it will very likely involve more clearly defined claims of anticompetitive conduct than the present case.

### **III. PETITIONER CONCEDED THAT ANY STATE ACTION IMMUNITY ENJOYED BY THE BOARD APPLIES EQUALLY TO BEVERLY.**

Section III of this brief is included only because Supreme Court Rule 15.1 requires that any misstatements in the petition must be pointed out in the brief in opposition to certiorari and not later, if they have a bearing on what issues properly would be before the Court if certiorari were granted.

The petition does not state that the parties below agreed that any immunity enjoyed by the Board applies also to Beverly. The District Court based its oral opinion granting Beverly’s motion for summary judgment on this undisputed proposition. Appendix, page 41. The opinion quoted the following admission from CFCR’s pleadings:

CFCR reluctantly admits that it is unable to find any case law supporting the position that here Beverly . . . would be liable for violations of the federal antitrust laws as a result of its dealings with the Board, an immune party.

*Id.*

Even if certiorari were granted, the issues would not include whether the Board could enjoy state action immunity without the immunity extending also to Beverly.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CLERK

In The  
Supreme Court of the United States

October Term, 1989

CENTRAL FLORIDA CLINIC FOR  
REHABILITATION, INC.,

*Petitioner,*

v.

CITRUS COUNTY HOSPITAL BOARD and  
BEVERLY ENTERPRISES, a California  
corporation d/b/a BEVERLY-GULF  
COAST, INC.,

*Respondents.*

On Petition For Writ Of Certiorari To  
The United States Court Of Appeals  
For The Eleventh Circuit

RESPONDENT CITRUS COUNTY HOSPITAL  
BOARD'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether certiorari review is justified when the court of appeals' affirmance, and the district court's summary judgment for the Hospital Board, was consistent with state-action immunity principles, because the legislation empowering the Hospital Board constituted clear, state policy, and the Hospital Board's alleged anticompetitive conduct was within the scope of its authority.

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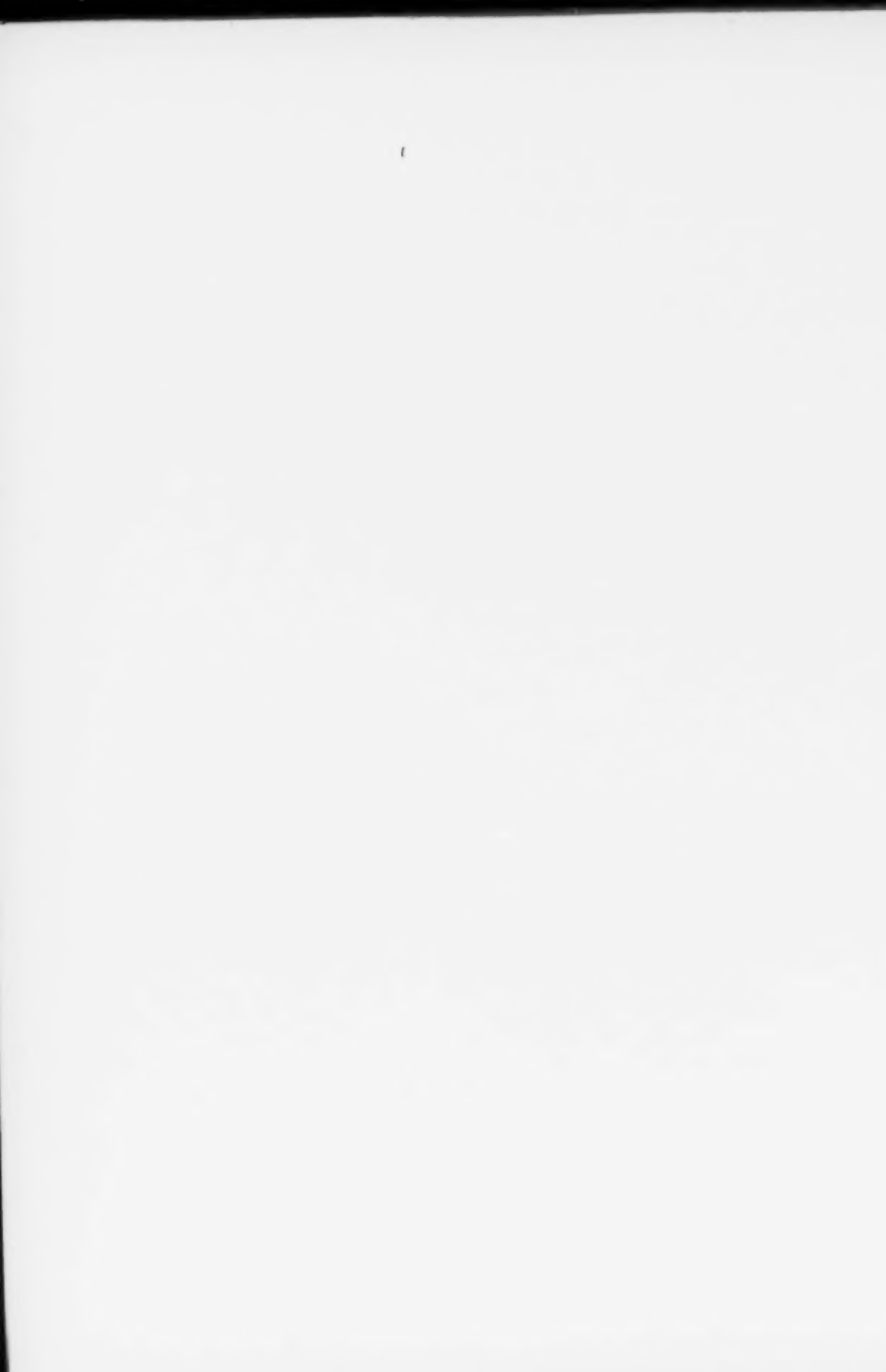
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## STATEMENT OF CASE

In accordance with Rules 24.2 and 14.1(g) of the Rules of the Supreme Court of the United States, Respondent adopts the statement of the case set forth in the Petition<sup>1</sup>, with the following key facts which are missing from Petitioner's statement of the case.

### (i) Course of Proceedings

The claims against Respondent, Citrus County Hospital Board (Hospital Board) arose out of the Hospital Board's contacts with Petitioner, Central Florida Clinic for Rehabilitation, Inc. (CFCR), concerning its possible acquisition of CFCR's therapy business, and the Hospital Board's replacement of CFCR as the therapy provider at Beverly's nursing home.

Respondent, Beverly Enterprises, Inc. (Beverly), did not take any position on the applicability of the state-action defense to the Hospital Board's conduct.

On January 9, 1989, the trial court entered an order granting the Hospital Board's long-standing motion for summary judgment on the basis of the state-action immunity doctrine. Beverly then moved for summary judgment on the ground that any such immunity should apply to Beverly insofar as it was a party contracting with the Hospital Board. The court granted Beverly's motion for

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<sup>1</sup> Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 1-5 (hereinafter 'Petition at \_\_\_\_').

summary judgment in its February 9, 1989 Order, and dismissed all remaining pendent, state-law claims.

### (ii) Statement of Facts

In addition to the facts set forth by Petitioner, CFCR, the Hospital Board, as an agency created by the Florida Legislature, is subject to the Florida Public Records Act, *Fla. Stat.* § 119.01 et seq., and Government in the Sunshine Act, *Fla. Stat.* § 296.0105 et seq.

The contractual relationship between CFCR and Beverly, by which CFCR provided therapy services to patients at Beverly's nursing home, was one (like all of CFCR's contracts with its various clients) which was terminable, or not renewable, without cause, by thirty-day, advance, written notice. Beverly ended its contract with CFCR in accordance with that provision.

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## SUMMARY OF ARGUMENT

The district court's summary judgment for the Citrus County Hospital Board, affirmed by the court of appeals, is consistent with this Court's decisions concerning state-action immunity, and with the court of appeals' applications of those decisions.

1. The activities of the Citrus County Hospital Board, a state agency created by the legislature and filled by appointments of the Governor, constitute state action.
2. The legislation authorizing the Hospital Board to act in the field of patient care,

treatment, and services constitutes a clearly-articulated state policy.

3. The conduct of the Hospital Board (which Petitioner charges to be anticompetitive) - acquiring a successor contract to provide outpatient therapy services to nursing home residents - is not illicit, but fully accords with, and is encompassed in, the Hospital Board's authority.

Nothing in the facts, or the law applied, in this case reflects any variation from established principles of law concerning state-action immunity, to warrant certiorari review by this Court.

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## ARGUMENT

THE COURT OF APPEALS' AFFIRMANCE, AND THE DISTRICT COURT'S SUMMARY JUDGMENT FOR THE HOSPITAL BOARD, ARE BOTH CONSISTENT WITH THE PRINCIPLES OF STATE-ACTION IMMUNITY ESTABLISHED BY THIS COURT'S DECISIONS.

The petition at hand presents no exceptional factual circumstances or legal decisions to require certiorari review by this Court.

The ruling of the district court, affirmed by the court of appeals, represents no departure or deviation from the principles underlying this Court's decisions, concerning the state-action immunity doctrine; or from the uniform way in which the lower federal courts have applied those same principles and decisions to agencies and other subdivisions of the states.

The district court's decision granting summary judgment (App. A), began<sup>2</sup> with the recognition and reasoning of this Court's analysis of state-action immunity in *Parker v. Brown*, 317 U.S. 347, 63 S.Ct. 307, 87 L.Ed. 307 (1943). Weighing the interests of federalism and state sovereignty<sup>3</sup> against the economic goals of the antitrust laws, this Court held that neither the language, nor the legislative history, of those laws<sup>4</sup> evinced an intent by

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<sup>2</sup> "The starting point in any analysis involving the state-action doctrine is the reasoning of *Parker v. Brown*." *Hoover v. Ronwin*, 466 U.S. 558, 567, 104 S.Ct. 1989, 1994, 80 L.Ed.2d 590 (1984).

<sup>3</sup> "The *Parker [v. Brown]* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61, 105 S.Ct. 1721, 1729, 85 L.Ed.2d 36 (1985). See *Patrick v. Burget*, 486 U.S. 94, 99, 108 S.Ct. 1658, 1662, 100 L.Ed.2d 83 (1988); 324 *Liquor Corp. v. Duffey*, 479 U.S. 335, 343, 107 S.Ct. 720, 725, 93 L.Ed.2d 667 (1987).

<sup>4</sup> The Court considered specifically only the Sherman Act, 15 U.S.C. § 1: "There is no suggestion of a purpose to restrain state action in the Act's legislative history." *Id.* at 351, 63 S.Ct. at 313.

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a State or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not likely to be attributed to Congress.

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Congress to preempt the power or restrain state action having anticompetitive results. *Id.* at 350-51, 63 S.Ct. at 313. Such action is exempt<sup>5</sup> or immune from antitrust liability.

This Court expressly acknowledged "the [sovereignty] basis of the state-action doctrine" in *Hoover v. Ronwin*, 466 U.S. at 574, 104 S.Ct. at 1998: "The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act." *Id.*

**Consistency with this Court's decisions concerning state-action immunity.**

Three cases from this Court, concerning state-action immunity for municipalities, govern the district court's decision, affirmed by the court of appeals: *City of Lafayette, La. v. Louisiana Power & Light Co.*, *supra*; *Community Communications Co. v. City of Boulder, Colo.*, 455 U.S. 40,

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The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

*Id.* at 350-51, 63 S.Ct. at 313.

<sup>5</sup> "The word 'exemption' is commonly used by courts as a shorthand expression for *Parker's* holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case." *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 393 n.8, 98 S.Ct. 1123, 1126 n.8, 55 L.Ed.2d 364 (1978). "Relying on principles of federalism and state sovereignty," the Court held that the Sherman Act "was not intended 'to restrain state action or official action directed by a state.'" *Patrick v. Burget*, 486 U.S. at 99, 108 S.Ct. at 1662.

102 S.Ct. 835, 70 L.Ed.2d 810 (1982); and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985).

1. This Court's plurality opinion in *City of Lafayette, La. v. Louisiana Power & Light Co.* ruled unmistakably that political subdivisions of the State, unlike the State itself, are not automatically immune from antitrust liability. 435 U.S. at 411, 98 S.Ct. at 1136. At the same time, this Court also explained that "*Parker [v. Brown]* and its progeny make clear that a state properly may, as states did in *Parker* and *Bates [v. State Bar of Ariz.]*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)], direct or authorize its instrumentalities to act in a way in which, if it did not reflect state policy, would be inconsistent with the antitrust law." *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. at 417, 98 S.Ct. at 1138 (emphasis added).

[T]his does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit.

We agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate any particular area, that the Legislature contemplated the kind of action complained of.'

*Id.* at 415, 98 S.Ct. at 1138 (quoting the Fifth Circuit's opinion) (emphasis added).

2. *Community Communications Co. v. City of Boulder, Colo.*, held that a home rule amendment to the state

constitution (although vesting plenary legislative power in the City over local matters) did not constitute a clearly articulated state policy that would exempt the City from the antitrust laws when it acted in an anticompetitive manner.<sup>6</sup> *Id.* at 56, 102 S.Ct. at 843.

[P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the state's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term "granted," necessarily implied an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to *Boulder's* moratorium ordinance is one of precise neutrality.

455 U.S. at 55, 102 S.Ct. at 843 (emphasis in original). The decision "means only that when the State itself has not *directed or authorized* an anticompetitive practice, the State's subdivisions in exercising their delegated power must still obey the antitrust laws." *Id.* at 57, 102 S.Ct. at 844 (emphasis added), quoting *City of Lafayette, La. v. Louisiana Power & Light Co.*, *supra*.

3. *Town of Hallie v. City of Eau Claire* considered "whether a municipality's anticompetitive activities are

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<sup>6</sup> The City enacted a moratorium against expansion by competing cable-television companies into other geographical areas of the City.

protected by the state-action exemption to the federal antitrust laws established by *Parker v. Brown*, [supra], when the activities are authorized, but not compelled, by the State." 471 U.S. at 36, 105 S.Ct. at 1715. The City of Eau Claire, Wisconsin had built a sewage treatment system, and then refused to allow surrounding towns access to the sewage treatment services, unless they agreed to take sewage collection and transportation services as well. *Id.* at 36-37, 105 S.Ct. at 1715. The Wisconsin statute<sup>7</sup> "specifically authorized Wisconsin cities to provide sewage treatment and ha[d] delegated to the cities the express authority to take action that foreseeably [would] result in anticompetitive effects. *Id.* at 43, 105 S.Ct. at 1718.

The Towns' argument amounts to a contention that to pass the 'clear articulation' test, a legislature must expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effect. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalogue all of the anticipated effects of a statute of this kind.

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<sup>7</sup> The Wisconsin legislature had granted authority "to construct, add to, alter, and repair sewerage systems," including the power to "describe with reasonable particularity the district to be [served]," without obligation to provide service otherwise. *Id.* at 41, 105 S.Ct. at 1717-18. This Court held that, "in proving that a state policy to displace competition exists, the municipality need not 'be able to point to a specific detailed legislative authorization' in order to assert a successful *Parker [v. Brown]* defense to an antitrust suit." *Id.* at 39, 105 S.Ct. at 1716.

Furthermore, requiring such explicit authorization by the State might have deleterious and unnecessary consequences. . . .

Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal court in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny. See 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 212.3(b) (Supp. 1982). . . . In fact, this Court has never required the degree of specificity the Towns insist is necessary.

*Id.* at 43-44 & n.7, 105 S.Ct. at 1719 & n.7.

#### **Consistency with decisions of the courts of appeals concerning state-action immunity.**

The courts of appeals have uniformly applied the standard and principles of this Court's analysis in *Town of Hallie v. City of Eau Claire* to subordinate governmental agencies, and other subdivisions of a state, as well as municipalities.<sup>8</sup>

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<sup>8</sup> *Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.*, 897 F.2d 198, 200, 203 (5th Cir. 1990) (public facilities authority, public corporation created and empowered by legislature to act for public purposes, was "neither the state itself nor a municipality," but was state agency entitled to state-action immunity for its conduct in selecting bond attorney); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1459-61 (9th Cir. 1989) (state bar, public corporation and instrumentality of judicial department of state, subject to public records act and public access requirements, was state agency "akin to a municipality" for purposes of

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## I. THE HOSPITAL BOARD'S ACTIVITIES CONSTITUTE STATE ACTION.

In the case at hand, the Hospital Board is not the state itself, but was "created and empowered by a special

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state-action immunity from liability for requiring all attorneys to purchase primary malpractice insurance from it), *cert. denied*, 58 U.S.L.W. 3651 (Apr. 17, 1990) (No. 89-1352); *Fuchs v. Rural Elec. Convenience Coop.*, 858 F.2d 1210, 1216-18 (7th Cir. 1988) (rural electric cooperative, a not-for-profit corporation whose only purpose was "to provide power to its members as cheaply as possible consistent with the requirements of its [federal] financing," was "a hybrid entity" - "neither a municipality nor a state agency" - "with sufficient non-private attributes" and "immune from antitrust liability as a state actor" because market-allocating service areas agreement was within contemplated intent of clearly-articulated state policy); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 890 (9th Cir.) (redevelopment agency of City of San Jose, and city itself, were immune from antitrust liability for concerted conduct (with private developing company) in amending municipal redevelopment plan, to relocate planned, multi-story parking garage, because authority granted by legislature's redevelopment act contemplated conduct challenged as anticompetitive), *cert. denied*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 489, 102 L.Ed.2d 526 (1988); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir.) (county and city "immune from antitrust liability under the state-action doctrine" for "sphere of influence agreement," allowing refusal to provide connection to county's main underground sewage pipes because statutory authority constituting clearly-articulated state policy contemplated such anticompetitive results), *cert. denied sub nom, Alter v. Schroeder*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988); *Sproul v. City of Wooster*, 840 F.2d 1267, 1269-70 (6th Cir. 1988) (city immune under state-action doctrine from liability for refusing to extend water and sewer service beyond corporate limits, for the plaintiff); *Kern-Tulare*

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enactment of the Florida Legislature." (App. A at 5). The district court concluded that the Hospital Board is a state

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*Water Dist. v. City of Bakersfield*, 828 F.2d 514, 517-21 (9th Cir. 1987) (city enjoyed state-action immunity from liability for refusing to allow water district to sell water acquired from city, because conduct within scope of statutory authority constituting clearly-articulated state policy), *cert. denied*, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988); *Campbell v. City of Chicago*, 823 F.2d 1182, 1183-85 (7th Cir. 1987) (city's conduct in establishing, by ordinance, ceiling on number of taxicabs, was logically foreseeable anticompetitive conduct within scope of clearly-articulated statutory authority, for which city enjoyed state-action immunity); *Pendleton Constr. Corp. v. Rockbridge County, Va.*, 837 F.2d 178-79 (4th Cir. 1988) (county, county's board of supervisors, and municipalities were all state-action for purposes of immunity from antitrust liability for denying rock-blasting permits to plaintiff); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 12-13 (1st Cir. 1987) (Massachusetts Port Authority, while not the state itself, was at least equivalent to municipality, and immune from antitrust liability for denying charter airline use of terminal C at Logan Airport, because within authority granted by legislature to "establish rules and regulations for the use of [Logan]."); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869 (9th Cir. 1987) (state executive agency immune, as state-action, from liability for exclusive contract with private association of drivers, for providing taxi service to and from international airport, because "alleged anticompetitive activities" contemplated by legislative authority granted); *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1289-91 (11th Cir. 1986) (Hillsborough County Aviation Authority, state agency created as public instrumentality by Florida Legislature to develop and administer public airports in Tampa region, was "analogous to a municipality," and immune from liability for granting or exclu[ding] of limousine operators to and from the airport" as encompassed within its "clearly-expressed state

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agency whose authorized conduct constitutes state action.

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policy"); *Coastal Neuro-Psychiatric Assoc. v. Onslow Memorial Hosp., Inc.*, 795 F.2d 340, 341-42 (4th Cir. 1986) (Onslow County Hospital Authority immune from antitrust liability under state-action doctrine, because exclusive contract with in-house radiologists for use of hospital's CAT scan equipment, denying the plaintiff use of same equipment, was within necessarily foreseeable scope of authority granted by North Carolina Legislature, as state policy); *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 756-57 (9th Cir. 1986) (county immune from antitrust liability for granting exclusive contracts to providers of paramedic services, but denying contract to the plaintiff because exclusionary conduct was foreseeable consequence of authorizing state policy, and not subject to attack under antitrust laws); *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1043-45 (2d Cir. 1986) (New York's Urban Development Corporation (UDC), an agency of the State, was immune from liability for anticompetitive effects of granting theater development lease-rights to some private operators, but denying others, concentrating operation of Broadway theaters in hands of few, because legislature envisioned that UDC would lease property in anticompetitive manner, and conduct was pursuant to clearly-articulated state policy); *Executive Town & Country Services, Inc. v. City of Atlanta*, 789 F.2d 1523, 1528-30 (11th Cir. 1986) (city immune from liability for establishing minimum limousine fares, under state-action immunity doctrine); *Falls Chase Special Taxing Dist. v. City of Tallahassee*, 788 F.2d 711, 712-14 (11th Cir. 1986) ("city's allegedly anticompetitive activities [attempting to acquire a monopoly of provision of water and sewage treatment services, and tying together provisions of such services] shielded, from antitrust liability" as state action, because legislature contemplated municipalities would act in anticompetitive manner when providing citizens with water supply); *Auton v. Dade City, Fla.*, 783 F.2d 1009, 1010-11 (11th Cir. 1986) (city immune

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## II. THE LEGISLATION AUTHORIZING THE HOSPITAL BOARD CONSTITUTES CLEAR, STATE POLICY.

The district court applied, as controlling, this Court's analysis in *Town of Hallie v. City of Eau Claire*, concerning state-action immunity for municipalities. The district court found the Hospital Board to be immune from liability for the conduct complained of by Petitioner, CFCR. The district court held that the legislation creating and authorizing the Hospital Board constitutes a clearly-articulated state policy, satisfying the state-action immunity from CFCR's antitrust charges (App. A at 9a, 10a-11a, 12a); and the court of appeals' affirmance agreed.<sup>9</sup> (App. B & C).

The district court followed this Court's ruling and explanation concerning "how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activities constitute state action." 471 U.S. at 40, 105 S.Ct. at 1717.

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from antitrust liability under state-action doctrine, for exclusionary ordinance prohibiting construction of private water wells for drinking, irrigation, cleaning, or processing purposes within city limits, because "anticompetitive effects logically would result from broad authority to regulate").

<sup>9</sup> Petitioner acknowledges that, "[i]n affirming the judgment below, the [court of appeals] apparently agreed with the district court's finding that the [Hospital] Board's enabling legislation expresses a clearly articulated state policy conferring immunity on the [Hospital] Board from antitrust liability." Petition at 17-18.

It is not necessary . . . for the State legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. Applying the analysis of *Lafayette v. Louisiana Power & Light Co.*, [supra], it is sufficient that the statutes authorized the City to provide sewage service and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate.

471 U.S. at 42, 105 S.Ct. at 1718. "[T]his Court has never required the degree of specificity that [Petitioner<sup>10</sup>] insists is necessary," 471 U.S. at 44, 105 S.Ct. at 1719, for immunity from liability under the antitrust laws.<sup>11</sup>

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<sup>10</sup> Legislation, "such as that creating the [Hospital] Board, that *authorizes, rather than mandates*, certain conduct is insufficient to support a finding of a clearly-articulated and affirmatively expressed policy to displace competition with regulation or monopoly public service." Petition at 15 (emphasis added).

If the [Hospital] Board had been given the *express authority . . . to enter into exclusive contracts that are anti-competitive in nature*, the agreement between [Respondent] Beverly and the [Hospital] Board might be immune from federal and state antitrust laws.

*Id.* at 24 (emphasis added).

Petitioner's view, that explicit legislation, mandating the Hospital Board's activity, in entering into contracts for the delivery of out-of-hospital patient therapy services to patients of nursing homes, within Citrus County, is squarely inconsistent with the ruling of this Court, and of later lower federal courts, concerning the character of the authority constituting a clearly-articulated state policy for state-action immunity.

<sup>11</sup> Petitioner also charged the Hospital Board (in Counts II, IV & VI of the Third Amended Complaint (App. D at 28a, 30a,

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For purposes of ruling on whether the petition at hand warrants certiorari review, this Court may formulate and decide the issue as follows:

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32a)) with violating state antitrust laws, *Fla. Stat.* §§ 542.16 & 542.20, which are patterned after the Sherman Act, and intended to complement the federal decisions interpreting the Sherman Act. See *Advantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1340-41 (11th Cir. 1987); *Auton v. Dade City, Fla.*, 783 F.2d at 1010 & n.1; *Palazzo v. Gulf Oil Corp.*, 754 F.2d 1381, 1386-87 & n.5 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058, 106 S.Ct. 799, 88 L.Ed.2d 775 (1986); *American Credit Card Tel. Co. v. National Pay Tel. Corp.*, 504 So.2d 486, 488 & n.1 (Fla. 1st D.C.A. 1987); *East Naples Water Sys., Inc. v. Board of County Comm'rs. of Collier County*, 473 So.2d 309, 310 (Fla. 2d D.C.A. 1985); *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028, 1032 (Fla. 2d D.C.A. 1984); *Sabates v. International Medical Centers, Inc.*, 450 So.2d 514, 517 & n.4 (Fla. 3d D.C.A. 1984); *Hackett v. Metropolitan Gen. Hosp.*, 422 So.2d 986, 988 & n.1 (Fla. 2d D.C.A. 1982), *appeal after remand*, 465 So.2d 1246 (Fla. 2d D.C.A. 1985). See *Fina Oil & Chem. Co. v. Boyette*, 530 So.2d 1037, 1038-39 (Fla. 1st D.C.A. 1988). Cf. *Sebring Utilities Comm'n v. Home Sav. Ass'n of Fla.*, 503 So.2d 26, 28-29 (Fla. 2d D.C.A.) (state action immunity applied to Commission, precluding ruling on Local Government Antitrust Act immunity), *rev. denied*, 515 F.2d 230 (Fla. 1987).

Apart from the district court's ruling (and the court of appeals' affirmance, that the Hospital Board enjoys the benefit of state-action immunity from federal antitrust claims, based on federal grounds; the ruling of immunity from Petitioner's state-law claims would not be reviewable by this Court, because based on an adequate and independent, state-law ground. *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S.Ct. 459, 463, 89 L.Ed.2d 789 (1945) (Court's "only power over state judgments is to correct them to the extent that they incorrectly

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Whether, on the facts known and asserted about the nature and legislative authority of the Hospital Board, and the conduct charged by Petitioner to be anticompetitive, the decisions of the two lower courts, that the Hospital Board is entitled to state-action immunity, are in accord with this Court's decisions in *Town of Hallie v. City of Eau Claire*, *supra*; *City of Lafayette, La. v. Louisiana Power & Light Co.*, *supra*, and *Parker v. Brown*, *supra*; or resemble more this Court's decision in *Community Communications Co. v. City of Boulder, Colo.*, *supra*.

Stated another way, the question is whether the nature of the Hospital Board's authority is akin to the general constitutional source of municipal authority rejected as affirmatively expressed state policy in *Community Communications Co. v. City of Boulder, Colo.*; or whether it is like the statutory enactments upheld as necessarily foreseeing anticompetitive conduct and its effects in *Town of Hallie v. City of Eau Claire* and *City of Lafayette, La. v. Louisiana Power & Light Co.*, and their lower-court progeny.

Both courts below held that the legislation creating and authorizing the Hospital Board to act in the field of

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adjudge federal rights," and not to render advisory opinions). Cf. *Michigan v. Long*, 463 U.S. 1032, 1042 & nn.7 & 8, 103 S.Ct. 3469, 3477 & nn.7 & 8, 77 L.Ed.2d 1201 (1983) (unless express and clear from decision itself that it rested alternatively on adequate and independent state-law grounds, Court would presume that federal grounds are sole basis and that jurisdiction exists); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566, 97 S.Ct. 2849, 2852-53, 53 L.Ed.2d 965 (1977) (despite the plaintiff's state-law claim, ruling in favor of news media's claim of federal constitutional privileges was not based on adequate and independent state ground).

patient care, treatment, and services in hospitals, nursing homes, convalescent homes, clinics, ambulance services, and other medical facilities within Citrus County, Florida is like the expansive grants of authority to act in specified areas, for particular purposes, in *Town of Hallie v. City of Eau Claire*, *supra* and *City of Lafayette, La. v. Louisiana Power & Light Co.* In both cases, this Court found anticompetitive conduct and consequences, necessarily to have been contemplated when that authority is exercised in those particular areas. The authority of the Hospital Board is far from the neutral Home Rule Amendment to the Colorado Constitution which "allocated only the most general authority to municipalities to govern local affairs," *Town of Hallie v. City of Eau Claire*, 471 U.S. at 43, 105 S.Ct. at 1718, but was otherwise indifferent to the particular field of activity (regulation of cable television service) in question.

### III. THE HOSPITAL BOARD'S ALLEGED ANTICOMPETITIVE CONDUCT WAS WITHIN THE FORESEEABLE SCOPE OF ITS AUTHORITY, AND WAS NOT ILLICIT<sup>12</sup>

The district court correctly held (App. A at 15a), and the court of appeals affirmed (App. B & C), that the

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<sup>12</sup> It is unclear whether Petitioner intended to abandon its claim that the Hospital Board's conduct was an illicit conspiracy, beyond the protection of its state-action immunity. That view, presented in the court of appeals, is not expressly raised in the petition. See *United States Dep't. of Justice v. Reporters Committee for Freedom of Press*, \_\_\_ U.S. \_\_\_, \_\_\_, 109 S.Ct. 1468, 1486, 103 L.Ed.2d 774 (1989) (Government, before Supreme

Hospital Board's participation with Beverly, in the concerted conduct charged by Petitioner, did not deprive the Hospital Board of its state-action immunity.

#### A. NOT ALL CONCERTED CONDUCT IS AN IL-LICIT CONSPIRACY.

An indispensable element of a Sherman Act § 1 violation is concerted (rather than unilateral) activity: "contract, combination, or conspiracy." *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984). See *Fisher v. City of Berkely, Cal.*, 475 U.S. 260, 267, 106 S.Ct. 1045, 1049, 89 L.Ed.2d 206, reh. denied, 475 U.S. 1150, 106 S.Ct. 1806, 90 L.Ed.2d 350 (1986) ("there can be no liability under § 1 [of the Sherman Act] in the absence of agreement").<sup>13</sup> "The essence of a contract, combination or conspiracy, which is

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Court, abandoned Exemption 3 issue it had presented to court of appeals and lost); *Goldberg v. Sweet*, 488 U.S. 252, \_\_\_ n.8, 109 S.Ct. 582, 586 n.8, 102 L.Ed.2d 607 (1989) (appellants abandoned in Supreme Court their due process and equal protection claims, presented in the Illinois Supreme Court); *United States v. Taylor*, 47 U.S. 326, 346, 108 S.Ct. 2413, 2424, 101 L.Ed.2d 297 (1988) (issues narrowed in Supreme Court by government's abandonment of two principal arguments advanced in district court and court of appeals).

<sup>13</sup> The same analysis, concerning concerted conduct under § 1 of the Sherman Act also "applies to the conspiracy element of [Petitioner's] section 2 claims," 15 U.S.C. § 2 (asserted in Count I of Third Amended Complaint (App. D at 26a)). *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 816 n.9 (11th Cir. 1990), petition for cert. filed, 58 U.S.L.W. 3598 (Mar. 9, 1990) (No. 89-1419).

condemned by [Sherman Act] § 1 is an agreement or mutual commitment to engage in a common course of anticompetitive conduct." *Greyhound Rent-A-Car, Inc. v. City of Pensacola*, 676 F.2d 1380, 1383 (11th Cir. 1982), cert. denied, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983).

However, not every concerted activity or agreement between an immune governmental entity, and not-immune private parties to engage in anticompetitive conduct, is an illicit conspiracy forfeiting state-action immunity. Specifically, it would be contradictory to hold (1) that a governmental entity empowered to enter into contracts (agreements) that may occupy a particular field of services or activity, and displace other participants and competitors, is clothed with antitrust immunity because acting according to clearly articulated state policy; but (2) that such an agreement ("contract, combination, or conspiracy", Sherman Act § 1) would at the same time strip the governmental body of its immunity. Using that flawed analysis, there would be very little room for concerted, immune conduct.<sup>14</sup>

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<sup>14</sup> If concerted conduct between an immune governmental entity, and a not-immune private entity, cost the governmental entity its state-action immunity, the only safe relationships for concerted conduct would be (1) between a governmental entity and the State itself; (2) between immune governmental entities only; and (3) between an immune governmental entity and an immune private entity (one acting not only according to a clearly articulate state policy, but subject to active state supervision, see *Patrick v. Burget*, 486 U.S. at 100, 108 S.Ct. at 1662-63; 324 *Liquor Corp. v. Duffey*, 479 U.S. at 343, 107 S.Ct. at 725;

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Numerous lower courts' decisions have upheld the state-action immunity of governmental bodies, acting pursuant to "clearly articulated" state policy, notwithstanding anticompetitive agreements between the state actor and private actors.<sup>15</sup>

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*Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. at 62, 65-66, 105 S.Ct. at 1729, 1731; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980)).

<sup>15</sup> See *Executive Town & Country Services, Inc. v. City of Atlanta*, 789 F.2d at 1528-30 (state-action immunity for a city, in establishing minimum limousine fares, despite charge of conspiracy to restrain plaintiff's business and to regulate it out of existence); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d at 892 (state-action immunity existed for city, and redevelopment agency, despite charges of participation in "larger conspiracy" with private developing company); *Pendleton Constr. Corp. v. Rockbridge County, Va.*, 837 F.2d at 178-79 (state-action immunity existed for governmental entities, despite charge of conspiracy between them and private defendants); *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d at 756-58 (state-action immunity existed for county, despite exclusive and exclusionary contracts with certain (primary) private actors, eliminating other (backup, alternative) ones); *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d at 1035, 1046-48 (state-action immunity existed for urban development corporation, despite contract and leases with private actors); *Springs Ambulance Serv., Inc. v. City of Rancho Mirage, Cal.*, 745 F.2d 1270, 1274 (9th Cir. 1984) (state-action immunity existed for municipality despite charges of monopolization and predatory pricing); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1435 (9th Cir. 1984), cert. denied, 471 U.S. 1003, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985) (state-action immunity existed for city, despite city displacing competition with regulation in the taxicab industry). Cf. *Sandcrest Outpatient Services*,

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"To avail itself [of state-action immunity, a governmental entity] must show only that it is adhering to a state policy to replace competition with regulation." *Omni Outdoor Advertising v. Columbia Outdoor Advertising*, 891 F.2d 1127, 1131 (4th Cir. 1989). A governmental entity loses the benefit of its state-action immunity from anti-trust liability, only by engaging in concerted conduct outside the scope of the activities for which the entity was authorized. "[A plaintiff] must show a *conspiracy not authorized by state law and thus beyond protection of state-action immunity*." *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d at 1291 (emphasis added).

The courts below correctly ruled that given state-action immunity exists, Petitioner had failed to carry its burdens to plead, and to prove, the existence of an agreement or concerted conduct ("a conspiracy") outside of the scope of authority bestowed on the governmental entity (App. A at 15a).

The mere fact that a "contract, combination, or conspiracy" exists between a state agency entitled to immunity and one or more private actors does not mean that the immunity is automatically lost.

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*P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1146 (4th Cir. 1988) (Powell, J.) (private corporation managing and acting in concert with governmental-unit hospital in terminating the plaintiff's contract to provide emergency room services, was immune under Local Government Antitrust Act of 1984, 15 U.S.C. § 36, and "allegations of a conspiracy [did not] convert authorized conduct into unauthorized conduct").

(App. A at 15a). This opinion is consistent with these authorities from the lower courts.

**B. AN ILLICIT CONSPIRACY REQUIRES PROOF OF CONCERTED CONDUCT BEYOND THE AUTHORITY OF CLEARLY ARTICULATED STATE POLICY.**

To establish that a conspiracy exists (and to avoid summary judgment or directed verdict)<sup>16</sup> in any antitrust

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<sup>16</sup> This Court "has said that summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving party.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). Despite the procedural difference, the standard, and the essence of "the inquiry under each[,] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the

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case, a plaintiff must produce evidence that tends (1) to prove a "conscious commitment" to enter into a scheme (2) "designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984).<sup>17</sup> To exclude equally

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standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . " *Anderson v. Liberty Lobby, Inc.*, \_\_\_ U.S. \_\_\_, \_\_\_, 106 S.Ct. [2505, 2511], 91 L.Ed.2d \_\_\_ (1986).

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), reemphasized that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," *id.* at 589, 106 S.Ct. at 1356, with which a party may survive a motion for summary judgment.

[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

*Id.* at 597-98, 106 S.Ct. at 1361. "Mere complaints of illegal conspiracy that are equally consistent with permissible competition, without more, do not support an inference of conspiracy." *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579 (11th Cir. 1988).

<sup>17</sup> This Court, in turn, quoted from Judge Aldisert's opinion in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105,

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plausible explanations for challenged conduct, a plaintiff, wishing to negate state-action immunity by means of an illicit conspiracy, must produce evidence that excludes concerted conduct from the authorized scope of a clearly articulated state policy.

"We may presume, *absent a showing to the contrary*, that the [governmental entity] acts in the public interest." *Town of Hallie v. City of Eau Claire*, 471 U.S. at 45, 105 S.Ct. at 1719 (emphasis added). To strip a governmental entity of its state-action immunity, a plaintiff must present evidence of a defendant's "*ultra vires* conduct" – "an unauthorized and unforeseeable conspiracy." *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d at 825. "[A governmental entity's] departure from state procedural requisites would have to be extreme to warrant the threat of anti-trust liability." *Falls Chase Special Taxing Dist. v. City of Tallahassee*, 788 F.2d at 714, quoting *Scott v. City of Sioux City*, 736 F.2d 1215, 1216 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1864, 85 L.Ed.2d 158 (1985).

The court, in *Griffith v. Healthcare Auth. of City of Huntsville*, 705 F.Supp. 1489 (N.D. Ala. 1989), held that the Healthcare Authority was immune, under the state-action doctrine, from the plaintiff's antitrust claims for injunctive relief, and granted summary judgment for the

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111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 198, 68 L.Ed.2d 300 (1981): "The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. at 764, 104 S.Ct. at 1471.

defendants. *Id.* at 1502, 1507. The plaintiff's claim of an illicit conspiracy was rejected:

[T]he antitrust plaintiff must show a conspiracy *not authorized by state law* and thus beyond the protection of state-action immunity. *Commuter Transp. Sys., Inc. v. Hillsborough County [Aviation Auth.]*, *supra*, 801 F.2d at 1291; *Greyhound Rent-A-Car, Inc. v. City of Pensacola*, 676 F.2d 1380 (11th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983). No such showing has been made by this plaintiff physician who has further wholly failed to demonstrate the existence of any genuine issue of fact that would warrant trial on the state-action immunity defense.

*Id.* at 1506-07 (emphasis supplied).

In *Sweeney v. Athens Regional Medical Center*, 705 F.Supp. 1556 (M.D. Ga. 1989) a nurse midwife alleged violations of the Sherman Act against a public hospital and certain doctors arising out of the hospital's denial of access to patients at the hospital. The court rejected the plaintiff's argument that the hospital engaged in purely private, anticompetitive conduct that overstepped the boundaries of the state policies, resulting in ARMC's loss of state-action immunity. *Id.* at 1563. The hospital's conduct was not purely parochial and not for the benefit of its own business interests. *Id.* at 1564.

Instead, [the hospital] was acting in response to its interests of providing safe medical care for its patients and ensuring a calm working relationship between the AWC doctors and the other medical staff at the Hospital.

*Id.* The hospital's actions were pursuant to state policy and not "illicit", entitling the hospital to immunity from

antitrust violations under the state-action exemption set forth in *Parker v. Brown*. *Id.*

In *Omni Outdoor Advertising v. Columbia Outdoor Advertising*, 891 F.2d at 1132, the court concluded that ordinarily, the authorization granted by the State was sufficient to immunize the municipality for its actions in the regulation of billboards. However, there was evidence that the City was not acting pursuant to the state policy, but conspired solely to further the commercial purposes of a private party, to the detriment of competition. *Id.* at 1133. The court held that the City, which normally would have been entitled to state-action immunity, was not entitled to immunity in this case because it had acted outside the scope of its state policy, in a conspiracy with a private party for the "illicit" purposes of stifling competition and preserving the private party's monopoly. *Id.* at 1136-37.

In order for a governmental entity to be entitled to state-action immunity, its "action must be state action, not individual action masquerading as state action." *Whitworth v. Perkins*, 559 F.2d 378, 381 (5th Cir. 1977), *vacated*, 435 U.S. 992, 98 S.Ct. 1142, 56 L.Ed.2d 81, *reinstated*, 576 F.2d 969 (5th Cir. 1978), *cert. denied*, 440 U.S. 911, 99 S.Ct. 1224, 59 L.Ed.2d 460 (1979), *quoting Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959).

[T]he connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers

*granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case.*

*City of Lafayette, La. v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976), *aff'd*, 435 U.S. 389, 96 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (emphasis added). This Court's affirmance of the Fifth Circuit's decision in *City of Lafayette, La. v. Louisiana Power & Light Co.*, *supra*, contained the further admonition that "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." 435 U.S. at 417, 98 S.Ct. at 1138-39.

In the case at hand, the district court found, and the court of appeals affirmed, that Petitioner

[F]ailed to make a showing sufficient to establish the existence of a conspiracy that was not authorized by state law and thus beyond protection of state action immunity. Based on all of the evidence presented in support of and in opposition to the motion for summary judgment, the Court concludes that there is insufficient evidence favoring plaintiff for a jury to conclude that defendant participated in an illicit conspiracy or anticompetitive action which was not contemplated by the state.

(App. A at 15a). Petitioner presented no evidence that the Hospital Board acted solely for the commercial purposes of a private party, for the benefit of its members' business interests, or contrary to the public interest. Consequently, the courts below correctly determined there was insufficient evidence for a jury to conclude that the Hospital Board's concerted conduct was beyond the authority of

the state policy. The lower court's rulings on the issue of "illicit conspiracy" must stand.

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### CONCLUSION

The court of appeals' affirmance, and the district court's summary judgment for the Hospital Board, are both consistent with the principles of state-action immunity established by this Court's decisions. No exceptional factual circumstances or legal decisions exist to require certiorari review by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION

CENTRAL FLORIDA CLINIC  
FOR REHABILITATION, INC.,

Plaintiff,

vs.

Case No.  
87-71-Civ-Oc-12

CITRUS COUNTY HOSPITAL  
BOARD and BEVERLY  
ENTERPRISES,  
a California corporation d/b/a  
BEVERLY-GULF COAST, INC.,

Defendants.

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ORDER GRANTING MOTION FOR SUMMARY  
JUDGMENT

This cause is before the Court on the Amended Motion for Summary Judgment, as to Counts I through VI of the Third Amended Complaint, filed herein on August 30, 1988, by defendant Citrus County Hospital Board (hereinafter "Board"). A brief in support of said motion was filed herein on September 13, 1988. Plaintiff filed a response in opposition thereto on September 23, 1988. For the reasons discussed below, the motion for summary judgment will be granted. The Court expresses no opinion and retains jurisdiction as to Counts VII through X of the Third Amended Complaint.

Rule 56(c), Fed. R. Civ. P., states that summary judgment shall be rendered if "there is no genuine issue as to

any material fact and the moving party is entitled to a judgment as a matter of law." In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court explained the standard for summary judgment:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.

*Id.* at 322-323; *Young v. General Foods Corp.*, 840 F.2d 825, 828 (11th Cir. 1988). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986), the Court noted that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." See *Young*, 840 F.2d at 828; *Barnes v. Southwest Forest Industry, Inc.*, 814 F.2d 607, 609 (11th Cir. 1987) (equating standards for granting summary judgments and directed verdicts).

The Board's motion seeks summary judgment on the first six counts of the Third Amended Complaint, which counts allege violations of federal and state antitrust law. Plaintiff is a corporation which is engaged in the business of providing physical, occupational and speech therapy within Citrus County, Florida. The Board is a public non-profit corporation created by the Florida Legislature to operate hospitals and medical nursing and convalescent homes in Citrus County. Defendant Beverly Enterprises, Inc., (hereinafter "Beverly") is also a corporation engaged

in the business of providing physical, occupational and speech therapy within Citrus County.

In the Third Amended Complaint, plaintiff alleges that the Board violated §§ 1 and 2 of the Sherman Act in three ways. First, the Board allegedly attempted to monopolize and conspire (with Beverly) to monopolize patient therapy services in Citrus County, Florida, (Counts I and II). Second, plaintiff claims that the Board used monopoly power in one market (hospital patient care) as leverage to compete unfairly in another market (out-of-hospital patient therapy services) (Counts III and IV). Third, the Board allegedly agreed with Beverly to deal reciprocally between themselves, in transferring patients and providing out-of-hospital patient therapy services, producing an unreasonably anticompetitive restraint of trade (Counts V and VI).<sup>1</sup>

The parties have had adequate time for discovery,<sup>2</sup> and, for the purposes of the motion, there is no dispute as to the material facts. The Court is faced with the issue of

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<sup>1</sup> The Florida Antitrust Act, Fla. Stat. § 542.01 et seq., was patterned after the Sherman Act, and was intended to complement and follow the federal court interpretations of the Sherman Act. *Auton v. Dade City, Fla.*, 783 F.2d 1009, 1010 n.1 (11th Cir. 1986). The parties have recognized this in § 8 of the Pretrial Stipulation. Accordingly, the Court's ruling on Counts I, III, and V of the Third Amended Complaint, based on the Sherman Act, will apply as well to Counts II, IV, and VI of the Third Amended Complaint, which assert parallel, corresponding charges under the Florida Antitrust Act, Fla. Stat. §§ 542.18 and 542.19.

<sup>2</sup> The Court entered an Order on April 6, 1988, which set August 1, 1988, as the last day for Court supervised discovery.

whether the Board's allegedly anticompetitive actions are immune from the federal antitrust laws. Two aspects of state action immunity will be discussed in turn below: 1) whether the Board's conduct was pursuant to clearly expressed state policy which contemplated the kind of action complained of, and 2) whether plaintiff has proven an illicit conspiracy which would exclude the Board from state action immunity.

### *State Policy*

The first issue which must be addressed is whether the conduct with which the Board is charged in the Third Amended Complaint, assumed for purposes of summary judgment considerations to be true and to be anticompetitive, is immune from antitrust liability because carried out pursuant to clearly expressed state policy. The state action immunity stems from the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943). The Supreme Court held that neither the language, nor the legislative history, of the antitrust laws evinced an intent by Congress to preempt the power of the state to make and enforce state policies with anticompetitive consequences. *Id.* at 351-352. The Court refused to infer an intent to nullify a state's control over its officers and agents in activities directed by the legislature. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985) (citing *Parker*, 317 U.S. at 351). State action immunity exists in the instant case if the Board was created pursuant to a clearly articulated and affirmatively expressed state policy which contemplates the Board's actions. *See id.* at 44.

The Board was created and empowered by a special enactment of the Florida Legislature entitled the "Citrus County Hospital and Medical Nursing and Convalescent Home Act" (hereinafter "CCH Act"). 1965 Fla. Laws 1371, 1969 Fla. Laws 944, and 1970 Fla. Laws 1001. The Citrus County Hospital Board was constituted to be an agency of Citrus County and was "incorporated for the purpose of operating hospitals and medical nursing and convalescent homes in the County." CCH Act, § 3. The Board was created to operate public hospitals and nursing and convalescent homes "primarily and chiefly for the benefit of the citizens and residents of Citrus County." CCH Act, § 5. The Board is also authorized to operate an ambulance service. § 5.

The CCH Act granted extensive powers to the Board. The Board was granted the authority "to build, erect, expand, equip, maintain, operate, alter, change, lease and repair public hospitals and medical nursing homes and convalescent homes in Citrus County." § 5. The Act defines "operate" to include "build, construct, maintain, repair, alter, expand, equip, lease, finance, and operate." § 2. The Court notes that the word "expand" is not defined in the Act and may apply to the facilities or to the services provided. The Board has the authority to extend its services to patients from other counties and states. § 5. The Act grants authority for the Board to own and acquire property, to purchase any and all equipment needed\*and to enter into contracts to carry out the purposes of the Act. §§ 6, 8, 9, and 11.

The Board has been granted the authority to operate with a great deal of independence from the state. The Board may levy taxes, negotiate loans, borrow money,

and issue bonds and revenue certificates. §§ 6, 13-15. The Act authorizes the Board to have a quasi-regulatory function in § 10 where the Board "is empowered to and shall adopt all necessary rules and regulations and by laws for the operation of said hospitals, medical nursing homes and convalescent homes."

The Board's motion is controlled by the most recent Supreme Court precedent, *Town of Hallie, supra*. To establish state action immunity under the relevant legal standard, a subdivision of a state must establish only that the challenged conduct was part of a clearly articulated and affirmatively expressed state policy. The first step of the analysis is to identify a "clearly expressed state policy" that authorizes the actions of a state agency, municipality or subdivision. 471 U.S. at 38-39. If the anticompetitive activities subject to a Sherman Act claim are a foreseeable consequence of the state delegation, then the "clear articulation" standard is met and the state action doctrine bars the claim. *Id.* at 42-43.

The precise anticompetitive conduct of the Board that plaintiff challenges in this action is the Board's alleged attempt to be the sole provider in Citrus County of ancillary health care services; specifically, occupational and speech therapy services on an outpatient basis. The Court must examine in detail the statutory framework to determine whether the Board's allegedly anticompetitive conduct in its provision of therapy services in its service area was a foreseeable consequence of the legislature's delegation of power. As noted above, the Florida legislature's delegation of power to the Board in its statutory charter is expansive. Undoubtably, the Board has the power to provide ancillary health care services such as outpatient

therapy. The critical question, however, is whether the legislature contemplated, expressly or by implication, that the Board would occupy the entire field within its service area in a way which would exclude other competitors.

The question presented to the Supreme Court in *Town of Hallie* was "how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action." 471 U.S. at 40. The Court ruled that it was "not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Id.* at 42. A statute sufficiently indicates a state policy which contemplates anticompetitive effects if it authorizes a municipality or state agency to provide a service and to determine the areas to be served. *See id.* In *Town of Hallie*, a Wisconsin statute "specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects." *Id.* at 43. "[I]n proving that a state policy to displace competition exists, the municipality need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit." *Id.* at 39.

The Supreme Court held that the "clear articulation" test does not require that a legislature expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects:

This contention embodies an unrealistic view of how legislatures work and of how statutes are

written. No legislature can be expected to catalogue all of the anticipated effects of a statute of this kind. . . . Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal court in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

*Id.* at 43-44.

Since *Town of Hallie*, the Eleventh Circuit has provided additional guidance concerning state action immunity in antitrust cases. In *Commuter Transportation Systems, Inc., v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), the plaintiff alleged that the Aviation Authority was violating antitrust laws by the way in which it was restricting the operation of plaintiff's airport limousine service. The Authority was a state agency authorized to develop and administer public airports in the Tampa, Florida, area. The Authority limited limousine service due to vehicular traffic congestion at the airport; however, the plaintiff claimed that the Authority conspired with its competitors to exclude it from airport business.

The Court noted that "[u]nder the teaching of *Parker*, official conduct is immune from federal antitrust scrutiny if the state legislature 'contemplated the kind of action complained of.' " 801 F.2d at 1289 (*quoting Parker*, 317 U.S. 341). Because "[t]he Authority was authorized by the state to negotiate contracts with businesses as it may deem necessary for the development and expansion of

the airport and to grant concessions," the Court found that the Authority's actions were contemplated by the state legislature and, therefore, immunized under *Parker*. *Id.*

In the instant case, this Court notes that the Board, like the Authority, was created by the Florida Legislature and its trustees were appointed by the Governor. *Id.* at 1288. Also, both the Board and the Authority were authorized to exercise wide discretion in providing services within a given area. *Id.* Although neither the Board's actions in expanding into ancillary health care services nor the Authority's actions pertaining to limousine services were specifically authorized by the state legislature, the Court finds that, as with the Authority's actions, the Board's actions were contemplated by the legislature.

In *Falls Chase Special Taxing District v. City of Tallahassee*, 788 F.2d 711 (11th Cir. 1986), and *Auton v. Dade City, Fla.*, 783 F.2d 1009 (11th Cir. 1986), plaintiffs claimed that municipalities were violating antitrust laws by monopolizing water and sewage treatment services and by controlling the construction of water wells, respectively. In both cases, the Court held:

While a general grant of authority to govern local affairs is insufficient to constitute a clear articulation of state policy because the State's position is neutral with respect to the city's conduct, *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54-56, it is not necessary for the legislature to state explicitly that it intends or expects the municipality's conduct to have anticompetitive effects.

*Falls Chase*, 788 F.2d at 713; *Auton*, 783 F.2d at 1010. The state action immunity applied in both cases because the

state statutes cited in the cases indicated that "the legislature recognized that municipal public works often require anticompetitive practices." *Id.*

Plaintiff argues that all three of these recent Eleventh Circuit cases are tied closer to express authority from the state which clearly contemplates anticompetitive conduct. Plaintiff also argues that, unlike the Board, the defendants in these three cases had special authority to regulate. As noted above, however, the Board had complete authority to regulate the operation of the hospitals, medical nursing homes and convalescent homes in Citrus County. Although the state authority which contemplated anticompetitive conduct was clearer in the cases cited, the CCH clearly evidences a state policy which contemplated the Board's movement into the area of outpatient therapy services. The express grant of authority which defined the Board's purpose and area of operations may be fairly construed to contemplate that the Board might displace competition for outpatient services in Citrus County.

The Court notes that the statutory authority in the instant case is broad and expansive within a specified field and for a particular purpose. Section 3(a) of the CCH states that the Board is "incorporated for the purpose of operating hospitals and medical nursing and convalescent homes in the county." The Act clearly authorizes the Board to provide a service. The language of the CCH appears to give the Board wide discretion in the area of medical, including therapeutic, care in Citrus County. Although other portions of the CCH describe the Board's duties with reference to "public hospitals", section 3 appears to authorize the Board to operate all "hospitals" in the County. The Court finds that the CCH is

more than a general grant of authority and that the legislation establishing the Board is a clearly expressed state policy which contemplated the monopolization of ancillary health care services in Citrus County. Based on the CCH and the guidance in *Town of Hallie* and recent Eleventh Circuit cases, the Court finds that the Board's allegedly anticompetitive actions were a foreseeable consequence of the state legislation.

Plaintiff claims that two other Florida statutes indicate that the Florida legislature did not contemplate the Board's anticompetitive actions. In the "Health Facilities and Health Services Planning Act," Fla. Stat. § 381.493(2), eight general planning guidelines for individuals in the health care field are listed. The last statement reads as follows: "It is intended that strengthening of competitive forces in the health-services industry be encouraged." Because the statement is a general provision which is not mandatory, but merely permissive,<sup>3</sup> the statement does not negate or limit the Board's express authority to operate and make rules and regulations concerning the hospitals and medical nursing and convalescent homes in Citrus County.

The second statute cited by plaintiff as evidence that the Florida Legislature did not contemplate anticompetitive actions by the Board is Fla. Stat. § 155.40. The statute authorizes public hospitals to reorganize into not-for-profit Florida corporations. Plaintiff claims that since such new corporations would not be entitled to state

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<sup>3</sup> The statutory guidance is similar to one of the general Wisconsin statutes which the Supreme Court discussed in *Town of Hallie*, 471 U.S. at 42 n.5.

action immunity for anticompetitive actions, the statute indicates that there is no ongoing policy that would authorize the Board to engage in monopolistic conduct in ancillary areas. The Court finds that this statute is irrelevant to the issue at hand for two reasons. First, the statute only addresses reorganization of public hospitals into not-for-profit corporations; it does not address the limits of the powers of state agencies such as the Board. Secondly, it is possible for private actors (like a private not-for-profit corporation) to be entitled to state action immunity from antitrust allegations if the requisite state supervision exists. *See Town of Hallie*, 471 U.S. at 46.

Upon careful review of the grant of authority to the Hospital Board, the statutes cited by plaintiff, and the allegations in the Third Amended Complaint, the Court finds that the Florida legislature evinced a state policy that contemplates the occupation of parts or all of the particular field of delivering patient care, treatment, and services throughout Citrus County to the displacement of competition. The Board's allegedly anticompetitive conduct was a foreseeable consequence of the legislature's delegation of power to the Board.

#### *Proof of Unauthorized Anticompetitive Conduct*

The second aspect of state action immunity which must be addressed is whether plaintiff has proven that the Board's anticompetitive conduct exceeded the scope of the state action antitrust immunity. If a clearly articulated and affirmatively expressed state policy which contemplates anticompetitive conduct exists, as defined by *Town of Hallie*, plaintiff "must show a conspiracy not

authorized by state law and thus beyond protection of state action immunity.["] *Commuter Transportation*, 801 F.2d at 1291. "In *Greyhound Rent-A-Car, Inc. v. City of Pensacola*, 676 F.2d 1380 (11th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983), the court found the plaintiff must prove an illicit conspiracy to exclude the entity from state action immunity." *Id.*

In *Falls Chase*, *supra*, the plaintiff argued that the defendant municipality lost its immunity by failing to strictly follow state procedural requirements. 788 F.2d at 714. The Eleventh Circuit noted that in *Scott v. City of Sioux City*, 736 F.2d 1207, 1215-16 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985), the Court "decided that a city's slight departure from state mandated procedures did not abrogate the city's antitrust immunity." *Falls Chase*, 788 F.2d at 714. This Circuit cited with approval the following language from *Scott*: "The city's departure from state procedural requisites would have to be extreme to warrant the threat of antitrust liability. State authorization for antitrust purposes does not require administrative decisions that are free from ordinary errors." *Id.* Based on the policies supporting immunity from liability for anticompetitive conduct, this Court finds that the requirement of an extreme departure from state requirements applies as well to state agencies which depart from their express authority to act.

Plaintiff cites *Bolt v. Halifax Hospital Medical Center*, 851 F.2d 1273 (11th Cir. 1988), in support of its claim that the Board participated in an illicit conspiracy which would negate the Board's immunity from antitrust liability. In *Bolt*, the plaintiff, a physician, claimed that a private, profit-making hospital, a private, not-for-profit

hospital, and a governmental district hospital participated in a community-wide conspiracy to revoke the plaintiff's staff privileges at all three hospitals. The Court ruled that such a conspiracy was not included within the scope of any articulated policy of the State of Florida. Although the governmental hospital district had otherwise been clothed with state action immunity, it did not enjoy that immunity for this conspiracy "to rid a medical community of a particular physician." *Id.* at 1284.

The conspiracy in *Bolt* was not protected by state action immunity because it was beyond the scope of any "clearly articulated" state policy authorizing it. The removal of physicians from the staffs of other hospitals and the expulsion of physicians from the county medical society are actions which appear to be motivated more by malice toward the individual physicians than by authorized interests of state hospitals. In contrast to the conspiracy in *Bolt*, there is no significantly probative evidence in the instant case that the conspiracy between the Board and Beverly, assumed to be true, was not within the scope of the Board's authority.

The Court finds that the allegations in the Third Amended Complaint fall within the scope of patient care services and activities for which the Board is authorized by the CCH. Plaintiff's charge in Count I of a conspiracy to monopolize patient therapy services in nursing homes and other out-of-hospital settings is not extraneous to the powers and purpose conferred on the Board by the Legislature. Similarly, plaintiff's allegations in Count V of a reciprocal dealing agreement between the Board and Beverly is also within the purview of the Board's statutory authorization.

The mere fact that a "contract, combination, or conspiracy" exists between a state agency entitled to immunity and one or more private actors does not mean that the immunity is automatically lost. As noted above, this Circuit has held that an illicit conspiracy, not *any* conspiracy, must be proven to remove the state action immunity. *Commuter Transportation*, 801 F.2d at 1291. The Court finds that plaintiff has failed to make a showing sufficient to establish the existence of a conspiracy that was not authorized by state law and thus beyond protection of state action immunity. Based on all of the evidence presented in support of and in opposition to the motion for summary judgment, the Court concludes that there is insufficient evidence favoring plaintiff for a jury to conclude that defendant participated in an illicit conspiracy or anticompetitive action which was not contemplated by the state.

Accordingly, it is

ORDERED AND ADJUDGED:

1. That defendant Citrus County Hospital Board's Amended Motion for Summary Judgment as to Counts I through VI of the Third Amended Complaint is hereby granted; and

2. That summary judgment is hereby entered in favor of defendant Citrus County Hospital Board as to Counts I through VI of the Third Amended Complaint.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 9th day of January 1989.

16a

/s/ Howell W. Melton  
UNITED STATES DISTRICT  
JUDGE

Copies to:  
Counsel of Record

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**APPENDIX B**  
**IN THE UNITED STATES**  
**COURT OF APPEALS**  
**FOR THE ELEVENTH CIRCUIT**

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NO. 89-3131

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D.C. Docket No. 87-71

CENTRAL FLORIDA CLINIC FOR  
REHABILITATION, INC.

Plaintiff-Appellant,

versus

CITRUS COUNTY HOSPITAL BOARD,  
BEVERLY ENTERPRISES, a California  
corporation, d/b/a BEVERLY-GULF  
COAST, INC.,

Defendants-Appellees.

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Appeal from the United States  
District Court for the  
Middle District of Florida

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(September 27, 1989)

Before FAY and KRAVITCH, Circuit Judges, and  
THOMPSON\*, District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

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\*Honorable Myron H. Thompson, U.S. District Judge for the  
Middle District of Alabama, sitting by designation.

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APPENDIX C  
IN THE UNITED STATES  
COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

NO. 89-3131

---

CENTRAL FLORIDA CLINIC FOR  
REHABILITATION, INC.

Plaintiff-Appellant,

versus

CITRUS COUNTY HOSPITAL BOARD,  
BEVERLY ENTERPRISES, a California  
corporation, d/b/a BEVERLY-GULF  
COAST, INC.,

Defendants-Appellees.

---

Appeal from the United States  
District Court for the  
Middle District of Florida

---

ON PETITION(S) FOR REHEARING  
AND SUGGESTION(S) OF  
REHEARING IN BANC

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(Opinion *September 27, 1989*, 11 Cir., 198 \_\_, \_\_ F.2d \_\_).

(            )

Before FAY and KRAVITCH, Circuit Judges, and  
THOMPSON\*, District Judge.

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\*Honorable Myron H. Thompson, U.S. District Judge for the  
Middle District of Alabama, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch  
United States Circuit Judge

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## APPENDIX D

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION

CENTRAL FLORIDA CLINIC	)	
FOR REHABILITATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.: 87-71-
	)	CIV-OC-12
CITRUS COUNTY HOSPITAL	)	
BOARD and BEVERLY	)	
ENTERPRISES, a California	)	
corporation d/b/a BEVERLY-	)	
GULF COAST, INC.,	)	
	)	
Defendants.	)	

THIRD AMENDED COMPLAINT AND DEMAND FOR  
TRIAL BY JURY; INJUNCTIVE RELIEF SOUGHT

1. This action arises under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Jurisdiction is vested in this Court under the provisions of 28 U.S.C. § 1337 and under the principles of pendent jurisdiction.

2. Plaintiff Central Florida Clinic for Rehabilitation, Inc. (hereinafter referred to as "Central Florida"), is a corporation incorporated under the laws of the State of Florida, whose principal place of business is in Citrus County, Florida, and is engaged in the business of providing physical, occupational and speech therapy within Citrus County, Florida.

3. Defendant Citrus County Hospital Board (hereinafter referred to as "the Board") is a public non-profit corporation created in 1965 by Chapter 65-1371, Laws of Florida, known as the "Citrus County Hospital and Medical Nursing and Convalescent Home Act", incorporated for the purpose of operating in Citrus County all public hospitals and medical nursing and convalescent homes, and is currently engaged in the business of providing physical, occupational and speech therapy within Citrus County, Florida.

4. Defendant Beverly Enterprises (hereinafter referred to as "Beverly") is a corporation, incorporated under the laws of the State of California and authorized to conduct business in Florida as Beverly-Gulf Coast, Inc. Beverly has its principal place of business in the State of California. Beverly is engaged in the business of operating private medical nursing homes in various states of the United States, including the State of Florida.

5. Progressive Therapies, Inc. (hereinafter referred to as "Progressive") is a corporation, incorporated under the laws of the State of Florida, and having its principal place of business in Pinellas County, Florida. Progressive is engaged in the business of providing physical, occupational and speech therapy within Citrus County, Florida.

6. Dominick Micelli (hereinafter referred to as "Micelli") is an individual engaged in the business of providing physical therapy within Citrus County, Florida.

7. The Board operates and controls Citrus Memorial Hospital (hereinafter referred to as "Citrus") which is a public hospital located in Inverness, Florida, that provides medical care to the general public in that area.

Citrus is the only public hospital located in Citrus County and is the only hospital located within the city of Inverness, Florida.

8. Beverly owns, manages and operates Inverness Health Care Center (hereinafter referred to as "IHCC") which is a private nursing home located in Inverness, Citrus County, Florida, that provides residential nursing care to the general public in that area. IHCC is located in close proximity to Citrus.

9. Central Florida, the Board and Progressive are in the business of furnishing therapy treatment to a substantial number of persons who reside a portion of the year in Florida and a portion of the year in states other than Florida, or have travelled from their residences in other states to visit Florida.

10. The Board in the course of its business of operating Citrus has purchased on a regular and continuing basis, and will continue to so purchase, a substantial volume of goods, including supplies and medicines, from vendors in states other than Florida.

11. A substantial number of the persons treated by Citrus come from states other than Florida in that they reside in Florida part of the year and in a state other than Florida the remainder of the year, or are visiting from other states.

12. In the case of many patients at Citrus, payment of the fees charged by the hospital is regularly made by insurance companies and other providers located outside the State of Florida.

13. Beverly, in the course of its business, operates nursing homes in various states and regularly engages in interstate communication through use of interstate telephone services and through use of interstate mail.

14. Prior to March, 1986, and all times since then relevant to this claim for relief, Central Florida and Progressive competed in the area of Inverness, Florida, to provide occupational and speech therapy to outpatients.

15. Prior to March, 1986, and at all times since then relevant to this claim for relief, Central Florida and Micelli competed in the area of Inverness, Florida, to provide physical therapy to outpatients.

16. Prior to March, 1986, the Board did not offer physical, occupational or speech therapy on an outpatient basis.

17. In March, 1986, the Board decided to diversify the medical services offered through Citrus by providing physical, occupational and speech therapy on an outpatient basis.

18. In furtherance of its decision to provide therapy services, the Board, through its agents, Charles Blasband (hereinafter referred to as "Blasban" [sic]), and Don Henderson (hereinafter referred to as "Henderson"), entered into negotiations with Central Florida regarding the possible purchase of Central Florida by the Board.

19. During the course of negotiations, Henderson requested that Central Florida provide the Board with copies of all contracts and all financial records concerning its clientele. Central Florida supplied the Board with

these confidential business records on the express condition that they would be used only for the purpose of negotiating the possible acquisition and that their confidentiality would be strictly maintained. The confidential business records Central Florida provided to the Board included information concerning Central Florida's customers, the specific contractual terms between Central Florida and its customers, employment agreements, and income and expense figures.

20. Beverly (IHCC) was at that time a customer with whom Central Florida had contracted to provide therapy services.

21. The confidential business records provided to the Board included all of Central Florida's records concerning its business relationship with Beverly.

22. While in possession of Central Florida's financial records, the Board contacted each of Central Florida's customers, including Beverly, for purposes other than the furtherance of the Board's negotiations to acquire Central Florida.

23. After a review of Central Florida's confidential business records and contrary to the express terms under which they were provided, the Board informed each of Central Florida's customers, including Beverly, of its intention to diversify the services provided by Citrus by the addition of nursing home therapy services and represented that certain benefits would result to each customer, including Beverly, if the customer contracted directly with the Board for such services.

24. The Board represented to Beverly that IHCC would receive sufficient patient referrals from Citrus to fill its available nursing home beds if Beverly agreed to contract with the Board for therapy services.

25. Nursing homes such as IHCC generally receive their therapy patients by referral from primary health care providers or hospitals such as Citrus. In that case, Citrus is commonly referred to as an "upstream" health care provider. Conversely, IHCC is commonly known as a "downstream" health care provider.

26. Subsequent to being solicited by the Board, Beverly unilaterally terminated its contract with Central Florida to provide therapy at IHCC and entered into a contract with the Board to provide such therapy.

27. At the time that the Board made its decision to provide occupational and speech therapy services, Citrus had no licensed therapists on staff to provide such services.

28. The Board contacted Progressive and entered into an exclusive contract with Progressive on behalf of Citrus to provide occupational and speech therapy services to the patients using Citrus' services, including those at IHCC.

29. The Board contacted Micelli and entered into an exclusive contract with Micelli on behalf of Citrus to provide physical therapy services to the patients using Citrus' services, including those at IHCC.

30. Using Citrus' influential position as an upstream health care provider and the main source of nursing home patient referrals, the Board is able to demand a

greater number of the therapy patients available in the Inverness market by providing patient referrals only to downstream medical nursing homes who obtain therapy services from the Board, including IHCC.

31. The Board, through staff members and employees of Citrus, has exerted undue pressure, persuasion and influence on all patients of Citrus who require residential nursing care, in an effort to have those patients referred to medical nursing homes who obtain therapy services from the Board, including IHCC.

32. As a result of the actions of the Board, Central Florida has been required to retain counsel to prosecute this matter and is obliged to pay a reasonable attorneys' fee.

#### FIRST CLAIM

33. Plaintiff realleges the allegations in paragraphs 1 through 32 as if stated herein.

34. As used herein, the relevant product market is the rendition of nursing home therapy services and the relevant geographic market or submarket is the Inverness area of Citrus County, Florida.

35. By virtue of, inter alia, the foregoing acts and conduct, the Board attempted to monopolize the rendition of nursing home therapy services in the relevant geographic market or submarket, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. In addition, Beverly and the Board conspired, confederated, combined and agreed, each with the other, to monopolize the rendition

of nursing home therapy services in the relevant geographic market or submarket, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

36. In undertaking to acquire control over all nursing home therapy services in the Inverness area of Citrus County, Florida, the Board had a specific intent to monopolize that part of trade and commerce in the United States.

37. Because of the Board's control over nursing home patient referrals in the relevant market or submarket, the Board had and has a dangerous probability of successfully monopolizing the rendition of nursing home therapy services therein.

38. As a result of the Board's attempt to monopolize and the Board's and Beverly's conspiracy to monopolize nursing home therapy services in the relevant market or submarket, Central Florida has suffered immediate and irreparable damage to its business and property, and will continue to suffer damages in the future because of its exclusion from the Inverness market.

WHEREFORE, Central Florida prays that:

A. The court adjudge and decree that the Board has engaged in an unlawful attempt to monopolize and conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

B. The Board and Beverly be enjoined and restrained from, in any manner, continuing, maintaining or renewing the attempt to monopolize or conspiracy to monopolize.

C. The court enter a judgment against Beverly in an amount treble the actual damages Central Florida has sustained to its business and property as a result of the conspiracy to monopolize the rendition of nursing home therapy in the relevant geographic market or submarket.

D. The court award Central Florida costs, attorneys' fees and such other damages as the court deems appropriate.

## SECOND CLAIM

39. Central Florida realleges paragraphs 1 through 32 and 33 through 38 as if stated herein.

40. The Board's attempt to monopolize and the Board's and Beverly's conspiracy to monopolize nursing home therapy services in the relevant market or submarket is a violation of Section 542.19, Florida Statutes, and has resulted in an injury to the business of Central Florida.

41. All conditions precedent have been performed or have occurred.

WHEREFORE, Central Florida prays that:

A. The court adjudge and decree that the Board has engaged in an unlawful attempt to monopolize and conspiracy to monopolize in violation of Section 542.19, Florida Statutes.

B. The Board and Beverly be enjoined and restrained from, in any manner, continuing, maintaining or renewing the attempt to monopolize or conspiracy to monopolize.

C. The court enter a judgment against Beverly in an amount treble the actual damages Central Florida has sustained to its business and property as a result of the conspiracy to monopolize the rendition of nursing home therapy in the relevant geographic market or submarket.

D. The court award Central Florida costs, attorneys' fees and such other relief as the court deems appropriate.

### THIRD CLAIM

42. Central Florida realleges paragraphs 1 through 32 as if stated herein.

43. As used herein, the first relevant product market is the rendition of hospitalization services, the second relevant product market is the rendition of nursing home therapy services, and the relevant geographic market or submarket is the Inverness area of Citrus County, Florida.

44. At all material times, the Board monopolized the rendition of hospitalization services in the relevant geographic market or submarket.

45. By virtue of, inter alia, the foregoing acts and conduct, the Board exploited this monopoly power to seek or gain an unwarranted competitive advantage in the rendition of nursing home therapy services in the relevant geographic market or submarket, in violation of Section 2 of the Sherman Act, 15 USC § 2.

46. As a result, Central Florida has suffered immediate and irreparable damage to its business and property, and will continue to suffer damages in the future because of its exclusion from the Inverness market.

WHEREFORE, Central Florida prays that:

A. The court adjudge and decree that the Board has engaged in an unlawful exploitation of monopoly power in violation of Section 2 of the Sherman Act, 15 USC § 2.

B. The Board be enjoined and restrained from, in any manner, continuing, maintaining or renewing the exploitation of monopoly power.

C. The court award Central Florida costs, attorneys' fees and such other relief as the court deems appropriate.

#### FOURTH CLAIM

47. Central Florida realleges paragraphs 1 through 32 and 43 through 46 as if stated herein.

48. The Board's exploitation of its monopoly power to seek or gain an unwarranted competitive advantage in the rendition of nursing home therapy services in the relevant market or submarket is a violation of Section 542.19, Florida Statutes, and has resulted in an injury to the business of Central Florida.

49. All conditions precedent have been performed or have occurred.

WHEREFORE, Central Florida prays that:

A. The court adjudge and decree that the Board has engaged in an unlawful exploitation of monopoly power in violation of Section 542.19, Florida Statutes.

B. The Board be enjoined and restrained from, in any manner, continuing, maintaining or renewing the exploitation of monopoly power.

C. The court award Central Florida costs, attorneys' fees and such other damages as the court deems appropriate.

#### FIFTH CLAIM

50. Central Florida realleges paragraphs 1 through 32 as if stated herein.

51. As used herein, the relevant product market is the rendition of nursing home therapy services and the relevant geographic market or submarket is the Inverness area of Citrus County, Florida.

52. In the course of their negotiations, Beverly represented to the Board that Citrus would receive patient referrals from Inverness if Citrus agreed to contract with the Board for therapy services. The Board and Beverly agreed to condition this contract on mutual patronage.

53. By virtue of, *inter alia*, the foregoing acts and conduct, the Board and Beverly effected a contract, combination or conspiracy in restraint of trade or commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

54. The Board has substantial market power in the rendition of nursing home therapy services due to its control over nursing home patient referrals in the Inverness market. The therapy services contract between the Board and Beverly effectively excluded plaintiff from the Inverness market.

55. As a result, Central Florida has suffered immediate and irreparable damage to its business and property, and will continue to suffer damages in the future because of its exclusion from the Inverness market.

WHEREFORE, Central Florida prays that:

A. The court adjudge and decree that the Board and Beverly have effected a contract, combination or conspiracy in restraint of trade or commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

B. The Board and Beverly be enjoined and restrained from, in any manner, continuing, maintaining or renewing the contract, combination or conspiracy in restraint of trade or commerce.

C. The court entered [sic] a judgment against Beverly in an amount treble the actual damages Central Florida has sustained to its business and property as a result of the contract, combination or conspiracy in restraint of trade or commerce.

D. The court award Central Florida costs, attorneys' fees and such other damages as the court deems appropriate.

#### SIXTH CLAIM

56. Central Florida realleges paragraphs 1 through 32 and 51 through 55 as if stated herein.

57. The Board's and Beverly's contract, combination or conspiracy in restraint of trade or commerce is a violation of Section 542.19, Florida Statutes, and has resulted in an injury to the business of Central Florida.

58. All conditions precedent have been performed or have occurred.

WHEREFORE Central Florida prays that:

A. The court adjudge and decree that the Board and Beverly have effected a contract, combination or conspiracy in restraint of trade or commerce in violation of Section 542.18, Florida Statutes.

B. The Board and Beverly be enjoined and restrained from, in any manner, continuing, maintaining or renewing the contract, combination or conspiracy in restraint of trade or commerce.

C. The court entered [sic] a judgment against Beverly in an amount treble the actual damages Central Florida has sustained to its business and property as a result of the contract, combination or conspiracy in restraint of trade or commerce.

D. The court award Central Florida costs, attorneys' fees and such other damages as the court deems appropriate.

#### SEVENTH CLAIM

59. Central Florida realleges paragraphs 1 through 32 as if stated herein.

60. The Board obtained the confidential business records of Central Florida for the purported purpose of evaluating and negotiating the purchase of Central Florida's business but instead converted these confidential business records to its own use.

61. The Board used and converted Central Florida's confidential business records with the intent to deprive

or withhold from Central Florida control of the confidential business records, and with the intent to appropriate those records to the use of the Board.

62. The conversion and subsequent use of the confidential business records of Central Florida by the Board has caused substantial financial damage to Central Florida including, but not limited to, lost income, loss of future income, and loss of business opportunities.

63. All conditions precedent have been performed or have occurred.

WHEREFORE, Central Florida prays that:

A. The court award Central Florida the total compensatory damages determined to have been sustained by Central Florida.

B. The Board be enjoined and restrained from in any manner using, converting or transferring the confidential business records of Central Florida.

C. The court award Central Florida costs and such other damages as the court deems appropriate.

#### EIGHTH CLAIM

64. Central Florida realleges paragraphs 1 through 32 and 60 through 63 as if stated herein.

65. Central Florida provided its confidential business records to the Board on the express or implied condition that they be used only for the purpose of evaluating or negotiating the sale of the business and that the Board would maintain the information contained in Central Florida's trade secrets strictly confidential.

66. Under the foregoing circumstances, the Board had a fiduciary duty to Central Florida to maintain its sensitive business records and trade secrets in the strictest of confidence and for the exclusive purpose of evaluating or negotiating the sale of Central Florida's business.

67. The Board breached its fiduciary duty by misusing Central Florida's confidential records and trade secrets to advance the Board's own pecuniary and business interests.

68. As a direct result of the Board's breach, Central Florida has suffered damages.

69. All conditions precedent have been performed or have occurred.

WHEREFORE, Central Florida prays that:

A. The court award Central Florida the total compensatory damages determined to have been sustained by Central Florida.

B. The court award Central Florida costs and such other damages as the court deems appropriate.

#### NINTH CLAIM

70. Central Florida realleges paragraphs 1 through 32 as if stated herein.

71. Prior to March, 1986, Central Florida had an ongoing business relationship with Beverly.

72. That business relationship was made known to the Board during its purchase negotiations with Central Florida.

73. As a direct result of the communication from Citrus to Beverly during those negotiations, Beverly's agent, Linelle Lawson, terminated its contract with Central Florida and executed a contract with the Board for therapy services.

74. Such communication constituted an intentional and unjustifiable interference by the Board with the business relationship between Central Florida and Beverly.

75. The intentional and willful acts of Citrus were calculated to cause damage to Central Florida and to its lawful business and were done with the unlawful and malicious purpose of causing damage and loss, without right or justifiable cause on the part of Citrus.

76. As a result, Central Florida has suffered substantial financial damages including, but not limited to, economic loss, loss of future earnings, lost profits and lost business opportunities.

77. All conditions precedent have been performed or have occurred.

WHEREFORE, Central Florida prays that:

A. The court award Central Florida compensatory damages, costs of suit and such other damages as appropriate.

B. Central Florida have such further relief as the court may deem just and proper.

## TENTH CLAIM

78. Plaintiff realleges the allegations in paragraphs 1 through 32 as if stated herein.

79. Prior to August, 1987, Central Florida had an ongoing business relationship with physicians on staff at Citrus to provide therapy services to patients at Citrus.

80. Prior to August, 1987, the Board granted Central Florida hospital privileges as a provider of therapy services to patients at Citrus.

81. In August, 1987, the Board terminated Central Florida's hospital privileges and advised these physicians to use other such providers solely because plaintiff had initiated this action.

82. Such termination constituted an intentional and unjustifiable interference by the Board with the business relationship between Central Florida and these physicians.

83. The intentional and willful acts of Citrus were calculated to cause damage to Central Florida and to its lawful business and were done with the unlawful and malicious purpose of causing damage and loss, without right or justifiable cause on the part of Citrus.

84. As a result, Central Florida has suffered substantial financial damages including, but not limited to, economic loss, loss of future earnings, lost profits and lost business opportunities.

85. All conditions precedent have been performed or have occurred.

WHEREFORE, Central Florida prays that:

A. The court award Central Florida compensatory damages, costs of suit and such other damages as appropriate.

B. Central Florida have such further relief as the court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Central Florida demands trial by jury.

CERTIFICATE OF SERVICE

I certify that copy [sic] hereof has been furnished to Russell W. LaPeer, Donald A. Farmer, and James R. Pietrzak by mail this 25th day of March, 1988.

/s/

\_\_\_\_\_  
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Trial Counsel for Plaintiff

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